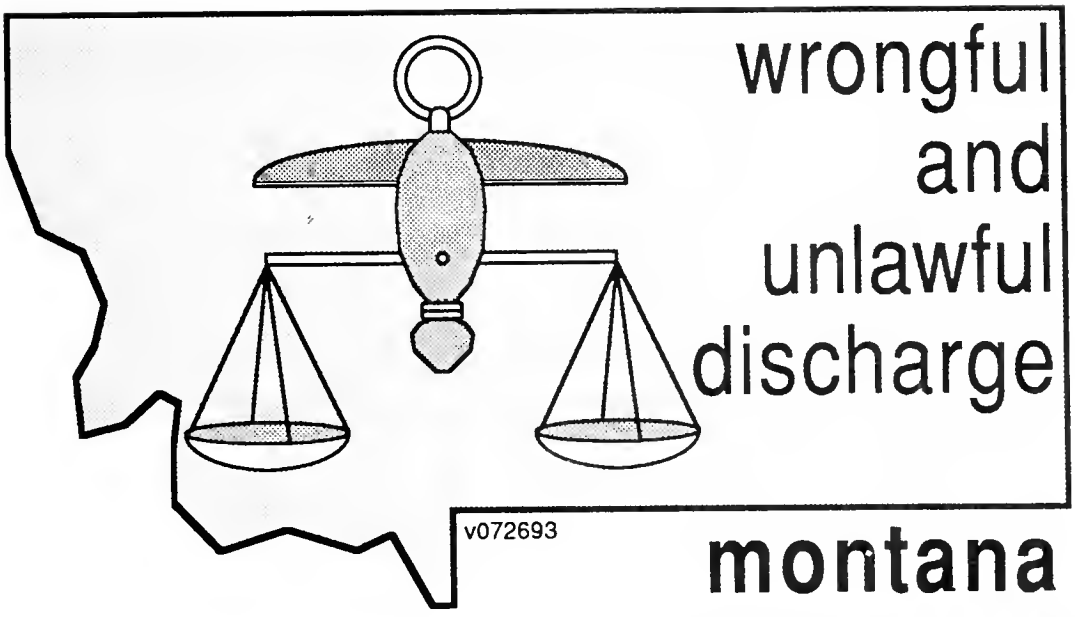

montana cases and considerations

compiled by John Moore

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To get more information on training available from the Professional Development Center — in particular the seminar "Fire Me & I'll Sue!" — call 444-3985.

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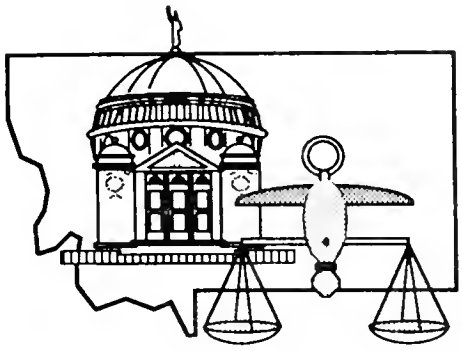

Wrongful & Unlawful Discharge: Cases & Considerations

Montana has seen a number of cases dealing with wrongful and unlawful discharge. In the mid-1980's, the state gained a reputation for judicial decisions that greatly favored employees in cases against their former employers. "Liberal" consideration of tort law and high awards to plaintiffs, along with the general move toward tort reform, led to the passage of the Wrongful Discharge from Employment Act in 1987. (A text of the law appears in the appendix.)

This summary traces, in chronological order, the development of case law in the area of discharge from employment. (An index of cases, with citations and page numbers, appears in the appendix.) Only Montana Supreme Court cases are presented here (with the exception of a few Federal District Court decisions); Montana district court cases that have not been appealed follow the Supreme Court precedents.

On June 29, 1989, the Supreme Court upheld the Wrongful Discharge from Employment Act (see *Meech v. Hillhaven,* p. 36). Thus many of the tort precedents described here no longer apply to the "at-will" employment relationship.

However, the Court has expanded the options available to employees under collective bargaining agreement and, possibly, individual contract (see *Foster v. Albertsons,* p. 67).

In another issue, the 1991 Legislature amended the statute granting immunity for legislative acts (2-9-111, MCA). The changes effectively removed the shield that protected school districts, many local government agencies, and the state legislature from wrongful discharge lawsuits.

As a result, the precedent set in *Bieber* (p. 26), *Peterson* (p. 34), and other cases no longer applies. The Court affirmed the effect of the legislation in *Dagel v. City of Great Falls* (see p. 61). (The amended law appears in the appendix.)

For further reading on many of the cases summarized here, consult these sources:

Bierman, L. and Youngblood, S.A. Interpreting Montana's Pathbreaking Wrongful Discharge from Employment Act: A Preliminary Analysis. *Montana Law Review, 53,* 1992, 53–74.

Hopkins, S.A. & Robinson, D.C. Employment At-Will, Wrongful Discharge, and the Covenant of Good Faith and Fair Dealing in Montana, Past, Present, and Future. *Montana Law Review, 46,* 1985, 1-24.

Hubble, J. Good Faith and Fair Dealing: An Analysis of Recent Cases. *Montana Law Review, 48,* 1987, 193–198.

Schramm, L.H. Montana Employment Law and the 1987 Wrongful Discharge from Employment Act: A New Order Begins. *Montana Law Review, 51,* 1990, 94–125.

EARLY DECISIONS — prior to *Gates*

Weir v. Ryan (1923) 68 Mont. 336

A married ranchhand had been hired at a rate of $75 a month. In offering the job by letter, the rancher had stated, "I think I can use you year-round." Six months later, the ranchhand was fired. In a lawsuit, the rancher claimed the employee did inferior work and knew little about irrigation. The ranchhand referred to the letter, saying that the phrase "year-round" established a contract for one year. The Court agreed: the letter was an oral contract obligating the rancher to employ the hand for one year. The Court held that, since the rancher had not shown that the employee's performance was, in fact, inferior, there was no cause for the discharge, so the contract was still in effect.

State ex rel. Nagle v. Sullivan, et al. (1935) 98 Mont. 425, 40 P.2d 995

Upon resignation of the governor, the lieutenant governor assumed office and soon dismissed the Fish & Game Commission so he could appoint his own choices. One member sued, claiming the governor could not remove him except for cause. The governor cited the statute which said a governor could remove a commission "for cause or for the good of the commission." The governor asserted that it was for the good of the commission for him to appoint his own choices. The Court disagreed, saying that the statutory phrase had to be taken as a whole, meaning a commissioner could be removed only for cause.

State ex rel. Opheim v. Fish and Game Commission (1958) 133 Mont. 162, 323 P.2d 1116

A Fish & Game biologist was summoned to a commission meeting, ostensibly to discuss one of the biologist's coworkers. Instead, the biologist himself was discharged by the commission without notice or hearing. After the biologist protested, a hearing was held some time later, and the commission upheld the discharge. The Court held that the biologist's due process rights were violated; by statute, the hearing should have been held prior to the discharge. The Court ordered the biologist reinstated and awarded costs of litigation.

State ex rel. Ford v. Fish and Game Commission (1966) 148 Mont. 151, 418 P.2d 300

A game warden, hunting along the Montana-Idaho border, had taken a bighorn sheep. He had a Montana sheep permit, but Idaho charged he had taken the sheep in Idaho. The department director went to the commission, seeking direction on how to handle the controversy. The commission suggested the director get the warden to resign, and if that failed, to fire him. The director fired the warden after he refused to resign. After the discharge, the warden received a hearing before the commission, which upheld the discharge.

At issue in the subsequent lawsuit was, who did the firing? One statute governed the director, stating that he could discharge an employee, and then grant a hearing if one were demanded. Another statute governed the commission, stating that it could discharge an employee only after a hearing had been held. The Court ruled that, since the director was acting at the behest of the commission, the commission had in fact fired the warden. The post facto hearing was thus a violation of due process under the second statute, and the warden was reinstated.

Weber v. Highway Commission of State of Montana (1971, federal) 333 F. Supp. 561

The plaintiff worked as a draftsman for the Highway Department for two-and-a-half years. His performance had been criticized, but his performance appraisals contained satisfactory ratings. He co-wrote a letter to the editor of the local newspaper; the letter was highly critical of the governor. Soon afterward, the department fired him, claiming that he had overstated his qualifications on his application form and had failed to divulge arrests he had had as a juvenile. The department did not grant a hearing on the discharge.

In the lawsuit, the federal district judge held that the commission had violated Weber's due process rights, since he was entitled to the job. The entitlement was not granted by virtue of initial employment or by state law. Rather, the department's regulations, which stipulated that discharge could only be for cause and after a hearing, created the entitlement. The judge described that entitlement in his opinion:

property right: "Where . . . the employment is under circumstances that give the employee an expectancy of continued employment, then the employee has a right or entitlement which cannot be divested without hearing. This is so not only as a matter of state law but as a matter of due process under the

14th Amendment."

However, the judge held that the department had not infringed on Weber's right of free speech:

free speech: "The fact that the motive for the firing was generated by plaintiff's exercise of his first amendment rights does not . . . prevent the Highway Department from dismissing him if a valid cause for the dismissal is shown. . . . I think that the first amendment does not go far enough [that it will] protect a person who turns a spotlight on himself from the consequences of what is disclosed in the glare of that light." However, in a 1972 decision (*Perry v. Sindermann),* the U.S. Supreme Court held that a valuable government benefit (such as a job) may not be denied on a basis that infringes on one's constitutionally protected interests, especially one's interest in freedom of speech.

Ameline v. Pack & Co. (1971) 157 Mont. 301, 485 P.2d 689

This case involved an alleged agreement for William Ameline to be employed by Pack and Co. for a period of one year at a monthly salary. Ameline's employment as a paver-operator was terminated after seven months. The company said there was no more work and it could not afford to carry a crew through the winter. Ameline sued to recover the balance of the year's salary, plus damages for moving expenses and wrongful termination. The trial court found in his favor, awarding about $3900, plus interest, court costs, and attorney fees.

On appeal, the company said the employment "contract" was month-to-month, not for the year. In addition, it stated that the discharge was for a "good cause," introducing evidence of drinking, hangovers, and other matters. The Supreme Court found that there was credible evidence pointing to a contract for one year. And although there was evidence to support the good cause for termination, there was also conflicting evidence in the testimony of Ameline's supervisor, who stated Ameline did good work. The Court also noted that the "good cause" defense by Pack "was not made an issue except as an afterthought." In affirming the award to Ameline, the Court said, "The defendent [Pack] had the burden of proof to establish the cause for discharge, if any there was, and simply failed to do so."

Storch v. Board of Directors (1976) 169 Mont. 176, 545 P.2d 644

Storch was a newly hired counselor at a mental health center. As such, he was a probationary employee. A member of the board of the directors of the center felt that Storch's dress, hygiene, and cohabitation with his girlfriend were unbefitting a counselor. The member wrote a letter to the director, urging him to fire Storch. The director tried to get Storch to resign and, when that failed, discharged him. Storch filed suit, claiming defamation of character and invasion of privacy. District court granted summary judgement for the board. The Supreme Court affirmed the judgement. Of importance is the Court's statement about probationary status:

probationary employee: "Finally, the facts stipulate that plaintiff was on probationary status. The purpose of such status is to provide a brief period in which to measure the employee's ability to perform the job before granting him a degree of job security. If the appropriate state employer feels that the employee is not measuring up during this probationary period, it can dismiss the employee without procedural due process."

This interpretation remains in effect to date.

Schend v. Thorson (1976) 170 Mont. 5, 549 P.2d 809

Terry Schend was hired as a police officer in Whitefish on October 8, 1974. He was serving a six-month probationary period when he received notice in February, 1976, that his employment would be terminated in March, 1976. The letter from the mayor, John Thorson, contained reasons for the termination. Schend requested a hearing before the Whitefish Police Commission; his request was denied.

Schend then brought this suit, which district court dismissed, leading to an appeal. The Supreme Court noted that the parties agreed that the law authorized "the removal of a probationary public employee or officer in a summary fashion, without necessity of cause or hearing." The sole issue, then , was whether due process was violated when the termination notice provided reasons and no opportunity to dispute the reasons was provided. The Court said no.

The Court referred to *Board of Regents v. Roth,* the 1972 US Supreme Court case that defined "property interest" to a government job and the need for due process. Under the *Roth* analysis, the Montana Court determined, "A probationary police officer under Montana law enjoys no property or vested right." Thus, no right of due process was violated.

In dissent, Justice Daly said the reasons in the letter constituted "charges" against Schend. Under Montana law, Daly argued, "the police commission shall hear, try, and decide all charges brought by any person against any member or officer of the police department." At stake, said Daly, was Schend's good name, reputation, and future employment.

Lindgren v. Board of Trustees (1976) 171 Mont. 360, 558 P.2d 468

Wesley Lindgren was a tenured teacher for fourteen years at Fergus County High School in Lewistown. In March, 1973, he plead guilty to a third DUI offense. On condition of rehabilitation, which he satisfied, he was able to withdraw his plea and have the charges dismissed in 1975. In August, 1973, the school board notified him of his termination for the DUI "conviction." Two hearings failed to resolve the issue.

The school board then amended its notice to include additional bases of dismissal. At a third hearing, Lindgren objected to this amendment and withdrew from the hearing when the board stuck by its second notice. The board then fired him. Lindgren then pursued a series of appeals that ended in a dismissal by the Supreme Court in 1974. This action sent the matter back to the County Superintendent of Schools, who upheld the dismissal. The State Superintendent affirmed that decision, as did district court. Lindgren then ended up again before the Supreme Court.

The Court held that the initial cause of dismissal — the DUI charge — "failed to substantial any causal relationship between appelant's violations and his performance of teaching duties. ... Absent such showing, the discharge of [Lindgren] amounted to a breach of contract." With regard to the amended notice to Lindgren, the Court noted, "The additional charges ... are derived from information which was available to the trustees at the time of the drafting of the initial letter of dismissal ... " Were the Court to recognize the amended notice, it would place a prejudicial burden on Lindgren to disprove charges that were entered to remedy what was an inadequate charge in the first place. It reversed the district court decision and sent the case back for determination of the appropriate remedy to Lindgren.

Swanson v. St. John's Lutheran Hospital (1979) 182 Mont. 414, 597 P.2d 702

Swanson was a nurse-anesthetist at the hospital. She had been scheduled to assist in a sterilization procedure — a tubal ligation — something she had done 20 times before. However, this time she refused. A "conscience statute" in Montana allows medical personnel to refuse to participate in abortions and sterilizations. Upon Swanson's refusal, the hospital fired her, giving her a "service letter" that stated she was discharged because of her refusal.

District court upheld the firing, finding Swanson to be an employee "of questionable value" on other aspects of performance the hospital had brought up during the suit. The Supreme Court reversed. It said the conscience statute created public policy allowing such refusal to participate, and no reading of the statute could rule out such refusal even if the person had previously participated. Thus, Swanson could assert her right at any time. The Court also said the district court had erred in considering other issues of performance; since the discharge letter had dealt only with Swanson's refusal, no other issues could be brought into the lawsuit.

Keneally v. Orgain (1980) 186 Mont. 1, 606 P.2d 127

The plaintiff worked for National Cash Register Company, starting as a salesman and eventually becoming account manager for a large region of the state. He frequently complained, verbally and in writing, to upper management about the company's poor service and maintenance of its products. Eventually, he was fired. He filed suit, stating a public policy claim that his discharge had been retaliation for his complaints. He also said the company was refusing to pay him commissions he had earned on sales prior to his discharge. The company responded that it fired Keneally for poor sales performance in his area. Further, NCR cited its policy to pay commissions on sales only upon installation. While Keneally had written some sales, he was fired before installation and thus would not receive the disputed commissions.

The Supreme Court upheld the discharge, stating that no public policy had been violated. That is, since the business practices of the company posed no peril to the public or misuse of public funds, such practices were the company's own business, and Keneally was not protected by the public policy exception to at-will status. Of importance, though, is that the Court cited *Monge v. Beebe Rubber Co.* (New Hampshire, 1974) and stated: "We do not disagree at this juncture that in a proper case a cause for wrongful discharge could be made out by an employee." The Court was thus willing to consider such a case, but found that this case did not meet the test of public policy violation. Regarding

Keneally's commissions, the Court held that, since the discharge was proper, Keneally was not entitled to any commissions except those on installations in the two-week period between the notice of termination and its effective date.

Reiter v. Yellowstone County (1981) 192 Mont. 194, 627 P.2d 845

Reiter worked 18 years for the county, advancing to the position of night supervisor/custodian. One night, he fired one of the staff janitors. Reiter, in turn, was fired. The county administration then began to reconsider its action. At an informal meeting with Reiter, the termination was revoked and he was placed on suspension, pending a hearing. The county commission repeatedly delayed holding a hearing, but continued to promise one "soon." Eventually, the commission decided against a hearing and fired Reiter, sending him a letter stating the reasons — reasons that Reiter disputed.

Reiter filed suit against the county. He claimed that his 18 years of service entitled him to a due process hearing before he could be terminated. He also said the commission acted in bad faith by repeatedly promising a hearing but then reneging.

The Supreme Court upheld the discharge, saying that Reiter was an at-will employee under Montana law. The Court said no independent source could be found that established an entitlement to the job, so the at-will statute applied. The Court 's opinion discussed current challenges to the at-will rule, but said, "While the rule may well be outdated, it is uniquely the province of the legislature to change it." Thus, Reiter had no claim to due process. The Court rejected Reiter's claim that his length of service implied a contract and that such a contract implied a covenant of good faith and fair dealing. Without a "contract," there could be no "covenant." According to the Court, even if there were a covenant, the commission did not act in bad faith since, under the law, it did not owe Reiter due process. Although the commission had promised a hearing, it was not an enforceable promise.

Staudohar v. Anaconda Co. (1981, federal) 527 F. Supp. 876

This case, in federal court, dealt with a 35-year employee of the Anaconda Company. He had been a foreman for almost three years, and thus was not a member of the collective bargaining unit. Staudohar was fired for possession of company gasoline. He did not receive a hearing. The court upheld the discharge, saying there is no public policy violation when the discharge is for cause. The court rejected the employee's claim that he had an entitlement to the job and thus was owed due process:

property right: " . . . it is the plaintiff's theory that after a lengthy period of employment an employee gains some kind of entitlement to a job which cannot be terminated for something less than good cause."

This is the same judge who had said, 10 years earlier in *Weber:* "Where . . . the employment is under circumstances that give the employee an expectancy of continued employment, then the employee has a right or entitlement which cannot be divested without hearing. This is so not only as a matter of state law but as a matter of due process under the 14th Amendment."

At issue is whether there was any independent source that supported an entitlement. In *Weber,* the judge said the Highway Department's rules supported an entitlement. In the Anaconda company, the collective bargaining agreement might have supported an entitlement. But Staudohar did not fall under the union contract, so he could not claim any entitlement. And as a private sector employee, he was not protected by any statute or administrative rule. Thus he was an at-will employee.

LATER DECISIONS — Gates and beyond

Gates v. Life of Montana Insurance Co. (1982, "Gates I") 196 Mont. 178, 638 P.2d 1063

Marlene Gates worked as a general receptionist and secretary for the insurance company. She had been employed about three-and-a-half years. One day, the manager informed her that her work and attendance were unsatisfactory, and he gave her the option of resigning or being fired. She resigned. That evening, Gates had second thoughts about her action and called the manager, asking to rescind her decision. The manager agreed, saying he would return her letter of resignation. He didn't.

Gates filed suit. She introduced into evidence the company handbook. Among other issues, the handbook laid out possible reasons for discharge and stated that employees would be given notice of problems before any action would be taken. This, Gates said, established a contract for employment that was in effect until she was informed of problems and failed to correct them. She also claimed she

had been pressured into resigning and sought damages for intentional infliction of emotional distress.

The company responded that Gates had resigned, so it was not liable for discharging her. In any case, she was an at-will employee and could be fired at any time. The handbook, said the company, was intended as general information, not a promise to which the company was bound. This was especially true since the handbook had been issued two years after Gates began her employment. District court granted summary judgement to the company, and Gates appealed to the Supreme Court.

The Court rejected Gates's claim that the company had breached her employment contract:

> "The employee handbook was not a part of Gates' employment contract at the time she was hired, nor could it have been a modification to her contract because there was no new and independent consideration for its terms. An employee handbook distributed after the employee is hired does not become part of that employee's contract. Therefore the handbook requirement of notice prior to termination is not enforceable as a contract right."

However, the Court did recognize that there was an employment contract, even though it was an at-will situation.

> "Gates next contends that her employer owed her a duty to act in good faith with respect to her discharge. The doctrine of implied covenant of good faith in employment contracts has been neither adopted nor rejected by this Court, although it was discussed in *Reiter v. Yellowstone County*... In *Reiter*we did not reach or decide the issue presented here.
>
> "The circumstances of this case are that the employee entered into an employment contract terminable at the will of either party at any time. The employer later promulgated a handbook of personnel policies establishing certain procedures with regard to terminations. The employer need not have done so, but presumably sought to secure an orderly, cooperative, and loyal work force by establishing uniform policies. The employee, having faith that she would be treated fairly, then developed the peace of mind associated with job security. If the employer has failed to follow its own policies, the peace of mind of its employees is shattered and an injustice is done."
>
> " . . . a covenant of good faith and fair dealing was implied in the employment contract."

With this conclusion, the Court adopted for the first time the implied covenant in employment situations. However, it rejected a tort of wrongful discharge, because there was no public policy violation. In reversing the district court's summary judgement, the Supreme Court sent the case back for trial on the facts. It would be up to a jury to decide if the company had breached the covenant of good faith and fair dealing.

Nye v. Department of Livestock (1982) 196 Mont. 222, 639 P.2d 498

Margaret Nye began her employment as a permit clerk with the Department of Livestock. She performed well on the job, passing her probation and achieving permanent status. After a year and a-half, she was promoted to general office clerk and placed on a six-month probationary period in the new job. Within four months, Nye was informed that her performance was inadequate. She was given a 10-day warning notice telling her that the deficiencies had to be corrected. At the end of the 10 days, Nye's supervisor determined her work was still deficient and fired her.

Nye filed a grievance within the department. The grievance committee conducted a hearing and determined that she had received inadequate training and supervision, and had not been treated in "total fairness." The committee recommended that Nye be promised a job on the level of either of the two she had held within the department. After reviewing the committee's recommendations, the department director decided to sustain Nye's discharge. Nye filed suit, seeking judicial review of the director's decision and asking damages for wrongful discharge. District court granted summary judgement to the department, and Nye appealed to the Supreme Court.

The Court rejected Nye's claim for judicial review, saying hers was not a contested case, since a hearing was not required by statute. However, the Court ruled that Nye could assert a claim that she had been wrongfully discharged: "Administrative rules may be the source of a public policy which would support a claim of wrongful discharge." "We find that the Department of Livestock failed to apply its own regulations to Margaret Nye, and thereby violated public policy."

The Court said that Nye had been properly terminated from her new position. "However, the same procedures were not applied to the permit clerk position in which Nye had achieved permanent status. ... Before the Department could remove Nye from the permit clear position [the old job] in which she had permanent status, the Department had the obligation to follow the public policy expressed in its own regulations.

"There was no showing of 'just cause' for removing Nye from her permanent status in the permit clerk position. She was entitled to proper termination from her permanent position." In this case, the Court recognized the tort of wrongful discharge in Montana, based on a violation of public policy.

Leyland v. Heywood (1982) 197 Mont. 491, 643 P.2d 578

Leyland was a nontenured professor at Eastern Montana College. He applied for tenure, and it was denied. The college then offered him a terminal contract, meaning he could teach for one more year. He requested a hearing and statement of reasons why he had been denied tenure. He also requested an extension of the deadline to sign the terminal contract until the tenure issue was settled. The college denied a deadline extension, denied the hearing, and since Leyland did not sign the terminal contract before the deadline, he had no job.

Leyland sued, claiming he was entitled to the hearing. To support his case, he cited comments the college president had made to a faculty meeting. The president had said he supported the faculty and hoped that everyone felt secure in their employment at EMC. Leyland claimed these comments supplemented his employment contract, giving him the expectation of continued employment.

The Court ruled that, as a nontenured teacher, Leyland had no vested right to the job, and therefore was not entitled to a hearing. The Court also said that the "general comments" of the president did not supplement the employment contract. In the court's view, Leyland was "simply a nontenured teacher who was not retained."

Lovell v. Wolf (1982) 197 Mont. 443, 643 P.2d 569

Helen Lovell had been elected to three 4-year terms as clerk and recorder of Deer Lodge County. Her last term was to expire in January, 1979, but in May, 1977, a city-county charter was put into place. In the reorganization, the County Commission changed the clerk and recorder position from an elected to an appointed office. Joseph Wolf was appointed manager of Anaconda-Deer Lodge County in July, 1977. Six months later, he told Lovell that she was to help another woman in the clerk and recorder's office. Although there was some confusion at the time, Wolf apparently appointed the woman as clerk and recorder, demoting Lovell to assistant.

In mid-February and mid-March, Wolf spoke with Lovell, "suggesting" she retire. When Lovell resisted, Wolf told her the work was unsatisfactory and that she was fired as of March 17, 1978. Lovell filed suit, seeking reinstatement to her position and backpay on the grounds that she had been improperly discharged. The district court denied her petition.

On appeal, the Supreme Court recognized "due process is the pivotal issue presented in this appeal." At the time of the changeover to a county charter, the County Commission had directed the adoption of a personnel system; this had not taken place within the specified time. The Court found that "[f]rom the city-county manager's first transfer of [Lovell's] duties to the final termination of her employment, [her] rights under the charter were neither recognized or protected." As elected clerk and recorder, Lovell had been general supervisor, not performing any of the specific jobs that required specific skills. Following her transfer to records clerk, she was called on to do technical jobs for which she had no expertise. Before terminating Lovell's employment, Wolf criticized the quality of her work. "However, the record is also clear that Wolf did not call this to her attention until the day he notified her that she was no longer employed, nor was any effort made to train her for the skills necessary to stay on the job."

The Court referred to the *Reiter* case (p.4) to point out that "to claim due process protection, an employee must be able to point to an independent source" that shows a property interest in the job. In this case, the Court said, there were three, primary among them the county charter. The Court reversed the district court judgement and sent the case back, instructing that Lovell be reinstated to her position as clerk and recorder, be given backpay from the date of termination (a five-year span), and that hearings be held to determine her future status as an employee.

Como v. Rhines (1982) 198 Mont. 279, 645 P.2d 948

This was a contract case arising in Missoula. Gary Como was an accountant living in St. Paul and seeking work in western Montana. In April, 1978, he traveled to Missoula and met with Jim Rhines, president of Sound West, Inc. After two interviews, Rhines and Como had agreed on compensation, benefits, and duties of the job. Payment of moving expenses was included in the agreement.

In early June, Como and his family moved to Missoula. On June 9, 1978, Como went to Sound West and told Rhines he still needed to work out housing arrangements. Rhines told him to do what was necessary and report to work later in the month. Around June 21, Como asked for a starting date. Sound West sidestepped the issue. When Como submitted a list of moving expenses, Rhines refused to pay them. Finally, around the end of June, Rhines told Como there wasn't a job for him.

Como's lawsuit was successful: District court found that a contract had been struck and that Rhines and Sound West had breached it. The Supreme Court agreed, but found some errors in the determination of damages to be paid to Como. The Court remanded with instructions on determining damages. Sound West had also appealed the fact that Jim Rhines had been found personally liable for the breach of contract. The Court found that the "rule of agency" generally protects corporate agents from liability, but that Rhines had not identified himself as an "agent" of Sound West sufficiently to enjoy the immunity. Thus, he was held personally liable.

Small v. McRae (1982) 200 Mont. 497, 651 P.2d 982

This is an interesting case involving the removal of Aaron Small from the chairmanship of the English Department at Eastern Montana College. Robert McRae, as Dean of the school of liberal arts, terminated Small's chairmanship and notified him and other departments by memorandum. The memo spelled out reasons the action was being taken. By the time the dust had settled, Small had filed a five-count claim against McRae, essentially boiling down to two allegations: 1) Small had been deprived of due process in the removal from the chair, and 2) McRae had libeled Small with the memo. District court granted summary judgement to McRae, and Small appealed.

The Supreme Court affirmed the summary judgement. The conclusions are briefly stated here; the path to those conclusions is a winding one, tracing constitutional law and judicial precedent. On the due process issue, the Court noted that Small belonged to a collective bargaining unit, and the collective bargaining agreement contained a grievance and arbitration procedure. Small had not used that procedure, electing instead to sue McRae. The Court, however, held that the grievance procedure would have provided adequate due process protection, had Small chosen to grieve. Since he did not, he could not claim deprivation of due process.

On the issue of libel, the Court relied on the *Storch* case (see p. 3) in holding that, under statute, the memorandum was an absolutely privileged communication conducted in the official discharge of McRae's duties as Dean. Under this privilege, by definition, there could be no libel.

Gates v. Life of Montana Insurance Company (1983, "Gates II") 205 Mont. 304, 668 P.2d 213

After the Gates case was sent back for trial, the jury found in her favor and awarded her $1891 in compensatory damages and $50,000 in punitive damages. The district court judge entered a judgement n.o.v. (notwithstanding the verdict), saying that punitive damages could not be awarded. On this issue, Gates appealed again to the Supreme Court.

The Supreme Court referred to the statute stating when punitive damages could be awarded in cases of fraud, oppression, or malice (27-1-221, MCA) and established a relationship with the covenant of good faith and fair dealing: "Breach of the duty to deal fairly and in good faith in the employment relationship is a tort for which punitive damages can be recovered . . ." The Court found that the jury had reason to find that such fraud, oppression, or malice had occurred. Thus the Court, by a four-to-three majority, ordered the punitive damages restored.

Owens v. Parker Drilling Co. (1984) 207 Mont. 446, 676 P.2d 162

William Owens went to work for as a roughneck for an oil drilling company. However, four days later, he was fired. Owens had lost an arm in a childhood accident. The company told him that, as a matter of safety, they simply could not employ a one-armed man. Owens pleaded for a chance, pointing to past experience in the same line of work and stating his performance had been satisfactory — even commendable. Sorry, the company said, rules are rules. Sorry, Owens said, I'll see you in court.

In his lawsuit, Owens charged that the company had discriminated against him on the basis of his handicap, violating state law. He further sought punitive damages, saying the company had recklessly disregarded his claims of competence and refused to test his ability. The company responded that its policies explicitly forbade employing workers who were missing an eye, an arm, a leg, a foot, or had other such handicaps that posed a reasonable danger to the worker himself or other employees. Citing the hazardous nature of oil-drilling work, the company claimed it had estab-lished a bona fide occupational qualification that excluded Owens from the job. District court granted partial summary judgement to the employer, ruling out any punitive damages.

On appeal to the Supreme Court, Owens argued that the discrimination against him was bad enough to warrant punitive damages. The Court disagreed: "The mere fact that the conduct on which the lawsuit is based is unlawful should not in and of itself authorize a recover [sic] of punitive damages." The plaintiff must also prove some malice or recklessness on the part of the employer. The Court did say, though, that malice could sometimes be presumed from violation of a statute. In considering the issue, the Court found:

> "Much confusion has been generated by inconsistent use of loosely defined terms such as willfulness, wantonness, recklessness, gross negligence, and unjustifiable conduct. To avoid future confusion it is necessary to adopt a carefully defined standard of conduct and prescribe its legal significance. We adopt this standard for presumed malice:
>
> "When a person knows or has reason to know of facts which create a high degree of risk of harm to the substantial interests of another and either deliberately proceeds to act in conscious disregard of or indifference to that risk, or recklessly proceeds in unreasonable disregard of or indifference to that risk, his conduct meets the standard of willful, wanton, and/or reckless to which the law of this State will allow imposition of punitive damages on the basis of presumed malice."

The Court then looked at the Human Rights Act (Title 49, MCA) and found that "[v]iolation of this statute warrants a claim for punitive damages if such violation is shown to be intentional or reckless." Given the facts that Owens could do the job safely, had done it before, that Parker Drilling made no investigation into Owens's ability and gave no specific facts to show that Owens would be unsafe, the Court said a case could be made that the company was reckless. It was a question to be decided by a jury.

On the matter of whether a jury should judge whether the company was reckless, the Court showed a vigorous defense of that role: "There are those who distrust the lay person's capacity for reasoned and dispassionate judgement. There are those who tolerate the juries but feel compelled to hold tight rein lest the wretched twelve break the bank. This judicial chauvinism will, if not checked, inevitably erode the jury process."

Bridger Education Association v. Board of Trustees (1984) *209 Mont. 31, 678 P.2d 659*

The Board of Trustees had not renewed the contract of a nontenured teacher. The teacher asked for a statement of reasons and was told "we think we can find a better teacher." The Supreme Court found this statement to be insufficient under the law (§ 20-4-206, MCA) that requires a school board to provide, on demand, a statement of reasons for nonrenewal. The Court interpreted the law to mean specific, objective reasons regarding performance or conduct.

A similar statute (§ 39-2-802, MCA) exists for all employers. Thus, if a discharged employee demands it, the employer must give a letter stating specific reasons for the dismissal. It is a good practice to do so even if the employee does not demand it.

Dare v. Montana Petroleum Marketing Co. (1984) *212 Mont. 274, 687 P.2d 1015*

In this case, the Montana Supreme Court significantly expanded its recognition of the covenant of good faith and fair dealing. Jacqueline Dare worked for six months as a cashier and station attendant at a Husky station, owned by Montana Petroleum Marketing Company. One winter's day, she fell in her yard when coming home from work. She went to the hospital and was given a neck brace to wear. The next day, she tried to get a coworker to work her shift for her, but the other person couldn't help out. Dare went to work. Three hours later, she called the station manager, saying she wasn't sure she could complete her shift. The manager told her to try. Dare took some pain pills and threw up in a garbage can. A customer called the manager to tell him about Dare's condition. The manager called Dare back and said he would come in to work for her and that she was fired.

Dare filed suit against the company. The manager alleged her performance was substandard and that he had warned her on several occasions about specific issues of performance and conduct. Dare disputed the manager's statements, saying that the "warnings" were general statements made to all employees. She admitted that the manager had once told her to improve her performance or be fired, but she also claimed the manager had later told her several times that she was doing an excellent job. District court granted summary judgement to the company on two grounds: there was no public policy violation in the discharge, and no covenant of good faith and fair dealing could be implied because the employer had no handbook outlining a discharge procedure, as in the *Gates* case (p.4).

The Supreme Court reversed the judgement. On the issue of public policy, the district court had said no law or administrative rules had been ignored or misapplied. The Supreme Court held that "[p]ublic policy violations may conceivably arise on other facts or theories" and that Dare was entitled to develop her argument.

More importantly, the Court dealt at length with the covenant of good faith and fair dealing. The Court held that "an employment handbook as promulgated by the employer in *Gates* is not essential in a cause of action for breach of the implied covenant of good faith and fair dealing. Implication of the covenant depends on existence of **objective manifestations** by the employer giving rise to the employee's reasonable belief that he or she has job security and will be treated fairly." (emphasis added)

The Court found evidence of such "objective manifestations": 1) Dare had been given a pay raise and insurance benefits after three months of employment, and she had been promised another raise; 2) Dare said the manager had told her wanted her to learn to do the station's bookkeeping; 3) the company had a written policy that an employee who showed independence and initiative would "most likely have a station of his own in the not too distant future." Although the company denied the Dare had any basis to believe she had job security, the Court held that these objective manifestations were sufficient "issues of material fact" to warrant a trial before a jury.

In a special concurring opinion, Justice Morrison argued even more strongly for the covenant of good faith and fair dealing while defining the at-will statute: "First, it should be made clear that this Court has not modified the 'at will' statute. Courts cannot amend statutes."

However, Morrison wrote,

> "[t]he statue refers to the term of employment but has nothing to do with the obligations owed by either party to the other. In other words, even though employment may be terminated at will, if a legal obligation is breached, that breach may give rise to separate tort action.
>
> "The covenant of good faith and fair dealing is implicit in every employment contract irrespective of a reasonable belief regarding job security. The law imposes an absolute obligation upon employers to deal fairly and in good faith with their employees from the commencement of the employment relationship.
>
> "An employer, under the 'at will' statute, has the right to terminate. However, if the employer violates the legal obligation to treat the employee fairly and in good faith, then separate and independent tort action can be instituted by the injured employee against the offending employer. Damages, not reinstatement, is the remedy."

Morrison also argued that the definition of wrongful discharge as a public policy violation was dead. When the Court, in Gates II, recognized the tort of breach of the covenant, the "new" tort subsumed the "old" tort. "All public policy violations would undoubtedly involve a breach of covenant of good faith and fair dealing."

Keep in mind, though, that Morrison's opinion did not reflect the majority view of the Court.

European Health Spa v. Montana Human Rights Commission (1984) 212 Mont. 319, 687 P.2d 1029

This case involved a charge of marital discrimination. Violet Haddow had worked for the health spa as a membership salesperson. Her husband was the spa manager. While Violet was on vacation, her husband was fired for fiscal hanky-panky. Violet came into the spa two days later and created quite a commotion, saying they were going to sue the spa and leveling accusations at the ownership. At that time, she was called on the carpet and fired.

Haddow filed a marital discrimination complaint with the Human Rights Commission (HRC). In

hearing, the spa claimed Haddow knew of her husband's activities, that she failed her duties as assistant manager, that she fell behind in sales, and that she was grossly insubordinate at the spa on the day she was fired. Haddow responded with her excellent sales record, a document contradicting that she was ever assistant manager, and a termination notice that showed the same dates of preparation and effect as her husband's notice.

The hearings officer found for Haddow. In a full hearing before the HRC, the Commission also found for Haddow and increased the award to $7500 back pay. The spa sued the HRC. District court sent the case back to the HRC, saying the Commission had not sufficiently reviewed the record before increasing the award. The HRC reconsidered the case, reviewed the record, and kept the same award. The case returned to district court, which affirmed the award and tacked on attorney's fees.

The spa appealed to the Supreme Court, which affirmed the district court decision. In the matter of the discharge, the Court commented that although Haddow had done actions that might have led to a legitimate discharge for cause (her insubordination), these occurred after the spa had already decided to fire her. Therefore, the spa's allegations against Haddow did not belong on the record. Haddow was fired because she was married to the fired manager, and this constituted marital discrimination. The Court charged that the spa did not follow the law or its own policy.

Welsh v. City of Great Falls (1984) *212 Mont. 403, 690 P.2d 406*

Dennis Welsh, a fire captain for the City of Great Falls, was unabled to continue in his job because of poor health. After three informal meetings with the fire chief, he was discharged. He filed suit against the city, claiming that due process required the city to provide a hearing before he was discharged. The city claimed the Welsh voluntarily retired. Even if he were discharged, said the city, no hearing need be offered in the case of physical disability. And even if a hearing were required, the city maintained that the meetings with the fire chief and the offer of an exit interview with the city personnel officer fulfilled the requirement.

At issue were the statutes governing firefighters. MCA 7-33-4122 provides for the appointment of a firefighter and states that he shall hold the job during good behavior and as long as he is physically able to do the job. MCA 7-33-4123 authorizes the fire chief to suspend a firefighter for neglect of duty or violation of rules. MCA 7-33-4124 outlines the hearing procedure to be followed in cases of suspension.

The Supreme Court held that "this statute provides no hearing remedy for one who is terminated for physical disability. Reading the three statutes together, as we must, they apply only to situations where neglect of duty or violation of rules is the alleged reason for termination. However, notwithstanding the statutory deficiency, we hold that section 7-33-4122 creates a property interest ... and therefore Welsh could not be terminated without first being given the opportunity for a hearing before an impartial tribunal."

After this finding, the Court ruled that "[t]he argument that the meetings between Welsh and the fire chief and operations officer satisfied the hearings requirement cannot be taken seriously." The Court voided Welsh's termination and ordered full pay and benefits from the time of termination until final disposition of the case. It also ordered the city to afford Welsh his hearing. Thus the Court, by a four-to-three majority, reaffirmed the due process rights of persons who hold a property interest in a job. In this case, the Court said the specific law required a hearing before termination, even while it said the hearing procedure stated in the law did not apply to physical disability. In dissent, Justice Weber stated that a hearing after the termination would have satisfied Welsh's constitutional right to due process.

Crenshaw v. Bozeman Deaconess Hospital (1984) *213 Mont. 480, 693 P.2d 487*

In this important case, the Supreme Court further expanded the covenant of good faith and fair dealing. Shirley Crenshaw had worked as a respiratory therapist with an independent company that contracted its services to the hospital. The hospital purchased the company and hired Crenshaw as a respiratory therapist. The hospital's policy provided for a 500-hour probationary period for new employees. At the time of Crenshaw's discharge, she was still in probationary status.

The discharge came about on a complaint from three intensive-care nurses. Following a meeting between the nurses and hospital officials, a discharge memo was written. It charged Crenshaw with insubordination, disrupting the continuity of care, continually getting in the way of patient care, disorderly conduct, unsatisfactory work performance, violation of safety and health rules, and breach of confidentiality. Subsequently, Crenshaw met with the hospital administrator to discuss the

matter. The administrator then interviewed persons present during the events that lead to the charges. The administrator finalized the firing. After her discharge, Crenshaw tried to get unemployment insurance benefits. The hospital told Job Service she had been discharged for unsatisfactory work performance and endangering patient well-being. Thus, Crenshaw was unable to find work in the Bozeman medical community.

Crenshaw filed a lawsuit and, in trial, disputed the charges the hospital had made. She introduced evidence to show that the charges were false, and that the administrator had failed to interview key witnesses to the events that led to her discharge. She alleged the hospital had removed a certificate from her personnel file. She also called an expert witness to testify on the breach of the covenant of good faith and fair dealing. The jury found for Crenshaw, awarding $125,000 compensatory damages and $25,000 punitive damages. The hospital appealed to the Supreme Court on four issues: 1) whether an at-will probationary employee is covered by the covenant of good faith and fair dealing, 2) whether the record sustained a separate action based on negligence, 3) whether the expert witness's testimony was admissable, and 4) whether the award of punitive damages was proper.

The Court held that "even in probationary employment relationships, the employer still owes his employee a duty of good faith and fair dealing." However, the Court also referred to *Dare* (p. 9) and said there were "objective manifestations" that led Crenshaw to believe her job was secure: 1) all of her contracted work had been at the hospital, 2) the hospital provided her with health insurance and a medical discount — benefits it extended only to permanent employees, 3) the hospital made no reference to her probationary status in its discharge memo or the administrator's discharge letter.

The question then arises, does the Court consider all employees to be covered by the covenant (as Justice Morrison argued in his opinion in *Dare),* or only those employees who can show objective manifestations that lead them to believe their jobs are secure? In *Storch* (p. 3), the Court agreed that probation is a period for evaluating an employee before granting job security. Thus, even though Crenshaw's case showed objective manifestations, the Court seems to say that these are not necessary:

> "We hold that the 'at-will' statute is very much alive. . . . There is no legitimate precedent for an exception for probationary employees. Therefore, Crenshaw even as a probationary employee was owed a duty of good faith. This requirement of good faith and fair dealing does not conflict with [the law], but merely supplements it. Employers can still terminate untenured employees at-will and without notice. They simply may not do so in bad faith or unfairly without becoming liable for damages. The Hospital's notification to the Bozeman Job Service of Crenshaw's unsatisfactory work performances deprived her of employment in the local medical community. This was an act of bad faith. The charges and allegations in the discharge memorandum were false. The charges were serious and resulted in Crenshaw losing her employment as well as jeopardizing her career. This was an act of bad faith. The record shows that Crenshaw's discharge was motivated by bad faith and warrants recovery for breach of implied covenant of good faith and fair dealing . . . ."

On the issue of negligence, the Supreme Court agreed with the district court's finding. The hospital's failure to properly investigate its charges against Crenshaw constituted negligence. The court also allowed the testimony of the expert witness to remain on the record. The Court acknowledged that the covenant is a complex issue. "[Dr. Vinton's] testimony assisted the trier of fact by providing the jury with information and a perspective beyond the common experience of a lay juror."

Finally, on the issue of punitive damages, the hospital noted that Crenshaw's discharge happened in the period between the two *Gates* decisions. The first decision affirmed the covenant of good faith and fair dealing, but it wasn't until the second *Gates* decision (after Crenshaw was fired) that the Supreme Court upheld punitive damages for breach of the covenant. Thus, the hospital argued it had not been "put on notice" that its actions may make it liable for damages. The Court disagreed, saying the first *Gates* decision put the hospital on notice to deal fairly and in good faith, and that the hospital's negligence was another basis for punitive damages.

Conboy v. State of Montana and Ethel Harrison (1985) 214 Mont. 492, 693 P.2d 547

Richard Conboy served in the capacity of Deputy Clerk of the Supreme Court for 20 years. In 1982, he ran for Supreme Court Clerk, an elective office. He lost the race to Ethel Harrison, who appointed a woman younger than Conboy to the Deputy Clerk office. When Harrison took office, she removed Conboy from the payroll.

Conboy filed suit, claiming Harrison had discriminated against him on the basis of sex, age, and political beliefs. District court dismissed the case through summary judgement. Conboy appealed to the Supreme Court, which affirmed the district court decision.

For one thing, the Court said, Conboy had never been appointed in writing to the Deputy Clerk position, as required by law, and he had never taken an oath of office, also required by law. Thus, the Deputy Clerk office had been legally vacant for 20 years; Conboy had merely been acting in the capacity as a "de facto public officer." When Harrison legally appointed the new clerk, his employment ended. The Court held that, since Conboy did not hold public office under a valid appointment, his removal from office was not a question for the Court to decide.

On the discrimination matter, the Court noted that the only evidence Conboy submitted was his own allegations. When Harrison filed a motion asking summary judgement, Conboy introduced no other evidence to support his claim of discrimination. Thus, by the rules of civil procedure, the District Court's grant of summary judgement was proper. The Supreme Court concluded, "In the absence of a factual showing of discrimination, we do not rule upon whether it may be unlawful for an elected public officer to discriminate on the basis of sex, age or political affiliation in the discharge or appointment of a deputy."

Poor Richard got no relief.

Pryor School District v. Supt. of Public Instruction, et al. (1985) 218 Mont. 73, 707 P.2d 1094

A nontenured school principal in Pryor was discharged on four counts of misconduct. He appealed the action to the Big Horn County Superintendent of Schools. The superintendent held a hearing and found that the discharge had not been for cause. The superintendent ordered the school district to reinstate the principal and compensate him for lost salary.

The school district appealed that decision to the state Superintendent of Public Instruction. At that time, the district tried to introduce new affadavits into the record. The state superintendent disallowed the new evidence. He said the evidence in the hearing at the county level had been sufficient, and besides, the new affidavits were sloppy — with passages whited out, pasted over, and handwritten on. He upheld the county superintendent's decision.

The school district sued the state superintendent, saying that he should have allowed the affidavits to be entered into the record. District court agreed with the superintendent, so the school district appealed to the Supreme Court. The Supreme Court affirmed the district court decision, saying that the county hearing was sufficiently thorough, and the new evidence would add nothing to the case.

Flanigan v. Prudential Savings and Loan Association (1986) 221 Mont. 419, 920 P.2d 257

In this decision, the Supreme Court reaffirmed many of the decisions already discussed. Mildred Flanigan worked for Prudential for 28 years in various positions; her performance was satisfactory throughout her career. She had reached the position of assistant loan counselor, but that job was to be eliminated in a reduction in work force. Prudential offered her a chance to attend a week-long teller training program in Salt Lake City. She accepted, and after returning from training, she began work as a teller. About three weeks later, she was discharged without notice or a hearing.

Within two weeks, Flanigan filed an age discrimination complaint with the Human Rights Commission. While that action was pending, Prudential offered Flanigan a part-time teller posi-tion, 14 months after they had fired her. She turned the job down. The HRC did not act on her com-plaint, but issued a "right to sue" letter. Flanigan filed suit in April, 1983 — three years after her discharge.

The jury in district court decided in favor of Flanigan. It awarded $94,000 in compensation, $100,000 for emotional distress, and $1,300,000 in punitive damages. Prudential appealed to the Supreme Court, which found six issues to decide: 1) was there enough evidence to justify submitting Flanigan's breach of covenant case to a jury? 2) was negligence an admissable charge against Prudential? 3) was it proper to admit the testimony of an expert witness? 4) should Prudential have been allowed to introduce "after-acquired" evidence into the trial? 5) should the back wages award have been reduced, since Flanigan turned down the part-time teller position? 6) was there enough evidence to allow the jury to award punitive damages, and were the damages excessive?

In trial, Prudential had given conflicting reasons for Flanigan's discharge. At first, the manager testified she was laid off in a RIF action. Later, he said she was fired for poor performance. He also testified that any errors she made as a teller did not warrant discharge. The manager admitted that Flanigan was never warned, reprimanded, or counseled about her performance, although Prudential's policies require such actions before termination. Prudential supervisors testified that most new tellers require two to six months to become proficient, yet Flanigan was fired after three weeks.

The Court's opinion discussed at length the covenant of good faith and fair dealing, relying on the *Dare* case (p. 9) as precedent. The Court concluded, "The covenant, in a long-term employment situation, only requires the employer to have a fair and honest reason for termination. . . . From the evidence presented, the jury could have found that appelants had no fair and honest cause for discharge and, in fact, had ulterior motives." On this basis, Flanigan had a good case for wrongful discharge.

On the negligence issue, the Court referred to *Crenshaw* (p. 11) as precedent and allowed the finding to stand. In Flanigan's case, Prudential committed 13 violations of its own policies, including failure to review Flanigan's prior work history and performance before deciding to discharge her. Also relying on *Crenshaw* as precedent, the Court allowed the testimony of an expert witness to remain on the record, in answer to the third issue above.

The fourth issue concerned an attempt by Prudential to introduce into the trial a summary of teller transactions from a few of the days that Flanigan worked as a teller. Prudential said the summary provided evidence of Flanigan's poor performance. However, the summary was not known to Prudential prior to Flanigan's discharge and could not have been used as a basis for the decision to fire her. As such, it was evidence acquired "after the fact," and based on the *Swanson* precedent (p. 4), the summary was inadmissable.

The fifth issue concerned the compensation awarded by the jury. Since Prudential had offered Flanigan a part-time job after her termination, the company argued that the compensation should be reduced by about $26,000 — the amount Flanigan would have earned in the part-time position. The Court stated that, although a discharged person has a duty to seek employment, he or she does not have to accept inferior employment. The part-time offer was inferior to Flanigan's former full-time job. Flanigan's refusal of inferior employment could not result in reduced damages.

Lastly, the Court considered punitive damages. In addition to the evidence showing breach of the covenant, the Court referred to testimony by Prudential's president that referred to older employees as "dead wood," "old dead wood," and "ballast." All the evidence was sufficient, the Court said, the justify a jury's award of punitive damages.

Prudential argued that $1.3 million in punitive damages was excessive and should be set aside. State law allows a Court to vacate damages if they appear have been based on passion or prejudice. However, the Court refused to consider the question: "[Prudential] failed to raise the issue of excessiveness in post-trial motions. The Court need not now consider that contention on appeal." Anyway, the Court said, "'[t]he amount to be awarded as damages is properly left to the jury and this Court will not substitute its judgement for that of the jury . . .' While the punitive damages in this case are large, they are within the discretion of the jury. . ."

The Court made its decision by a four-to-three majority. However, the only issue on which the minority dissented was the amount of punitive damages. On all other issues, the Court appeared to agree unanimously.

Fetherston v. ASARCO, Inc. (1986, federal) *635 F. Supp. 1443* and *638 F. Supp. 1328*

This federal district court case resulted in two opinions. Both are summarized here.

1.

The first decision dealt with two issues: (1) whether a determination of eligibility for unemployment insurance benefits collaterally estops a party from relitigating an issue of employee misconduct, and (2) whether failure to comply with 39-2-801, MCA, prevents an employer from presenting reasons for discharge in court. (The Montana Supreme Court later rendered two important decisions related to the first issue: *Nasi v. Dept. of Highways* (1988) and *Niles v. Weissman* (1990). Both are included in this booklet.)

Gerald Fetherston worked as a foreman for ASARCO at its East Helena plant. In August, 1984, he got married; he and his bride went for a ride. They drove through the ASARCO plant area, contrary to a specific company rule for off-duty employees. Another employee observed this and reported the infraction. As a result, Fetherston received a four-day suspension without pay. In December, 1984, he exacted his revenge on the informant: he punched him in the face at an East Helena bar. Shortly thereafter, Fetherston was fired.

Fetherston applied for unemployment benefits. His request was denied, as ASARCO said he had been fired for misconduct. Fetherston then tried to get his job back; ASARCO refused, but said they

would no longer oppose his application for unemployment benefits. The Department of Labor then granted his request, subject to appeal. ASARCO did not appeal. Around this time, Fetherston wrote to an ASARCO supervisor, requesting a written statement of the reasons for his discharge. ASARCO did not respond.

Fetherston filed suit, alleging breach of the implied covenant of good faith and fair dealing. In his suit, he moved for partial summary judgement. Because ASARCO had not opposed his second application for unemployment benefits, he said, it should be collaterally estopped from raising additional issues regarding his discharge and from relitigating the issue of his misconduct. He also asserted that Montana law prevented ASARCO from introducing reasons for his discharge when it had failed to provide the requested written statement to him.

"The principle of collateral estoppel serves to prevent relitigation of a particular issue or determinative fact which was actually or necessarily decided in a prior action," explained the federal district court. In this case, the issue was "whether a determination of entitlement to employment benefits by the Montana Department of Labor constitutes a final decision as the reasons for ... discharge ..." In prior cases, federal courts had ruled that collateral estoppel can be applied to decisions rendered by administrative agencies, but only after "a proceeding fully complying with the standards of procedural and substantive due process ..."

In Fetherston's case, the court noted, no formal hearing took place. "Montana unemployment compensation procedures are very informal," the court said. Given all the facts, "[t]he full panoply of issues which arises in a wrongful discharge suit is not within the realm of the Department of Labor's consideration of eligibility for unemployment benefits." Thus, the "case" had not been sufficiently "litigated" to bar ASARCO from defending the discharge in court.

The court decided against Fetherston on the second issue he raised, as well. The statute (39-2-891, MCA) says that if an employer fails to provided the requested written statement of the reasons for discharge, the employer may not "furnish any statement of the reason of such discharge to any person ..." Fetherston said this law should prevent ASARCO from presenting any defense in court regarding his discharge, since they were barred from making any statement about the reasons for the discharge.

The court disagreed: "... the provision [of the law] was intended to serve as a shield rather than a sword." The law should protect employees from blacklisting and discrimination, said the court. "It is clearly not intended to prevent an employer accused of bad faith in a wrongful discharge action from raising incidents of the employee's work history in defense of its actions." The court denied Fetherston's motions, and the jury trial ended the same day.

II.

The jury ruled in favor of Fetherston, awarding $359,347 in damages on breach of the covenant of good faith and fair dealing. ASARCO moved for a new trial, claiming the court had given erroneous instructions to the jury in two areas.

First, said ASARCO, the court had itself determined that the implied covenant of good faith and fair dealing existed in the employment relationship between Fetherston and ASARCO, then told the jury to decide whether ASARCO had breached the covenant in firing Fetherston. Instead, according to ASARCO, the very existence of the covenant was a question of fact for the jury to decide, not the court. The court agreed that "the Montana Supreme Court has never expressly addressed the particular issue ..." The court then examined three Montana cases (*Dare, Crenshaw,* and *Flanigan)* and concluded that "the Supreme Court of Montana has implicitly approved the procedure applied by the Court in this case." Under this interpretation, the trial judge determines, after the submission of all evidence at trial, whether the covenant existed as a matter of law; the jury then determines, as a matter of fact, whether the employer breached the covenant.

Second, said ASARCO, the court's instructions to the jury improperly placed the burden on ASARCO to prove Fetherston's misconduct. Yet the court's instructions to the jury indicated that Fetherston had the burden of proving that ASARCO breached the implied covenant of good faith and fair dealing. The court laid out this series of events: 1) "Plaintiff has the burden of proving first, that a covenent ... was implied ..., and second, that the covenant was breached." 2) Once the plaintiff establishes a prima facie case, "defendant must then ... establish it had valid reasons for terminating plaintiff's employment." If the issue is misconduct, "defendant must be prepared to come forward with facts proving such a defense, rather than expecting plaintiff to disprove it." The court denied ASARCO's motion for a new trial.

Dawson v. Billings Gazette, et al. (1986) *223 Mont. 415, 723 P.2d 238*

Patrick Dawson had been a reporter for the Billings *Gazette*. When he was dismissed, he filed suit against the newspaper, alleging breach of the covenant of good faith and fair dealing. In a jury trial, Dawson won his suit — sort of. The jury found that the *Gazette* had breached its duty of good faith and fair dealing. However, the jury awarded zero damages, compensatory or punitive.

Dawson asked for a new trial and was turned down. He then appealed to the Supreme Court. The Court upheld the jury award on three grounds: 1) Dawson had three sources of income after his discharge (severance pay from the paper, unemployment insurance, and freelance fees); 2) he failed to mitigate his damages — i.e., he did not diligently pursue comparable full-time work after he was fired; 3) he did not sufficiently prove he had been damaged.

In upholding the district court's refusal to grant a new trial, the Supreme Court noted that "the District Court must respect the jury's decision when conflicting evidence is present, as is the case here. To grant a new trial in light of conflicting evidence would be an abuse of discretion."

Mead v. McKittrick, et al. (1986) *223 Mont. 428, 727 P.2d 517*

June Mead worked for Cascade County in the district court. She started work in 1976 as a deputy clerk. In 1979, she advanced to the position of personal secretary to Judge William Coder. Judge Coder resigned from the bench in 1983, and Thomas McKittrick was appointed to replace him. The new judge told Mead that he planned to open her position for applications. She applied but was not interviewed. McKittrick then discharged her.

Ten days later, McKittrick sent Mead a letter, stating the reasons for dismissal. Mead said the letter merely outlined work patterns she had established with Judge Coder. She said the discharge was unfair, as McKittrick had told her to continue with her previous duties.

In mid-1984, Mead filed suit against McKittrick, the county commissioners, and Cascade County, alleging violation of due process, breach of contract, breach of the covenant of good faith and fair dealing, wrongful discharge, and fraud. The judge and commissioners claimed immunity from suit and asked for dismissal. The district court agreed, holding further that Mead was a court employee, not a county employee, and therefore "at-will."

Mead appealed. The Supreme Court held that "historically, judges have enjoyed absolute immunity for judicial acts." Further, the Court said, "the appointment and removal of key court employees is an effective judicial action." The Court reasoned that the secretary was highly important to the efficiency of the court, thus occupying "a distinct and unique status among district court employees."

Since the Court found McKittrick's action to be a "judicial act," the Court also found the county and commissioners to be immune from suit. State law provides that "The state and other governmental units are immune from suit for acts or omissions of the judiciary."

In dissent, Justice Morrison felt that "judges, in the treatment of their personnel, are subject to the same rules to which others in society are subject." He would separate judicial acts from administrative acts, which he felt Mead's dismissal was. Further, Morrison felt the county was not immune, since it had independently reviewed and approved the judge's decision to fire Mead. "While the county is immune for Judge McKittrick's acts, the county is responsible for its own conduct."

Justice Hunt dissented along similar lines. He said the majority opinion "does not adequately treat the issue of the county's responsibility in this matter, the county's conduct as an employer is improperly ignored." Both Morrison and Hunt said that Mead was a county employee, and therefore entitled to the rights and due process granted her by county policy.

Maxwell v. Sisters of Charity of Providence (1986, federal) *645 F. Supp. 937*

Dr. James Maxwell signed a contract in January, 1980, to be director of radiation oncology at Columbus Hospital in Great Falls. In July, 1982, the hospital gave him written notice that the contract would not be renewed on its next anniversary date, in January, 1983. Maxwell sued for breach of contract and bad faith, claiming his contract could neither be terminated nor not renewed without good cause. He relied on the language of the contract, as well as that during the contract negotiations, he was led to believe his contract would not be terminated except for cause.

The court cited three principles of contract construction: 1) a contract must be construed according to the intentions of the parties at the time of execution; 2) if there is no ambiguity, the language of the

contract governs its interpretation, and 3) other evidence may be used to explain the parties' intentions only if an ambiguity exists. The court quoted the contract clause and opined it was "clear and unambiguous." The contract could be terminated "simply by giving notice and that good cause was not required." Given this clarity in the contract, no other evidence need be considered.

With regard to the claim that the hospital breached the covenant of good faith and fair dealing, the court found no merit. "Since ... the [hospital] did not breach [the] employment contract, the [hospital] cannot be found to have acted unreasonably and in breach of the implied covenant of good faith and fair dealing ..." This ruling established a clear connection between breach of contract and breach of the covenant: if the contract was not breached, the covenant could not be. The Montana Supreme Court followed this precedent in the *Nordlund* case about 10 months later.

Miller v. Catholic Diocese of Great Falls, et al. (1986) 224 Mont. 113, 728 P.2d 794

Mary Miller taught fifth and sixth graders in Billings at the Little Flower School, a part of the Catholic school system administered by the diocese. Her first year of employment was rewarded with "outstanding" ratings in every category of her evaluation. The next year, though, Miller was under the supervision of a new "head teacher." This supervisor did not approve of Miller's teaching methods, particularly her "lack of discipline" in the classroom.

The head teacher talked with Miller on more than one occasion about the problem. Miller cited her previous evaluation, and felt that the problem was not discipline, but a difference of opinion on teaching methods. The school administrator, a priest, soon got involved in the dispute. He reflected on his own experience in Miller's classroom. He provided a few hours of religious instruction to the class each week, and he felt the lack of discipline there made the task difficult. Before the end of the first semester, the administrator fired Miller, stating the cause as lack of discipline in the classroom. Miller filed suit, saying the church had breached the covenant of good faith and fair dealing, particularly in not offering a hearing or other opportunity to defend herself. District court granted summary judgement to the diocese on the grounds that applying the tort of breach of covenant would interfere with freedom of religion. Miller appealed.

The Supreme Court concluded that the case could present a question of breach of the covenant of good faith and fair dealing. However, by a four-to-three majority, the Court affirmed summary judgement on the issue of religious freedom.

The reason for dismissal involved discipline in the classroom. "The suggestion is made that consideration can be given to methods of discipline without becoming involved with claims which are rooted in a religious belief," the majority said. "A judicial determination of the presence or absence of good faith on the part of [the administrator] would require the court to examine the school's discipline policy as applied to classroom instruction covering both religious and nonreligious subjects, and to evaluate [the administrator's] interpretation and application of that discipline policy. Such an examination of necessity would impinge upon elements of the teaching of religion, or the free exercise of religion."

In dissent, Justice Morrison disputed that the case involved the teaching of religion. "Plaintiff's case here is premised upon the fact that she was denied due process in connection with her termination. She was not afforded an opportunity to change. She was not given a hearing in which she could explain her position. Although the church is entitled to set whatever standards it wants respecting and imparting religious education to its students, the law does require that certain fair procedures are necessary in order to accord due process." (Technically, "due process" does not apply here, since Miller's termination does not involve a state action. Rather, such notice and hearing are broadly accepted elements of "fair treatment" by a private employer.)

Justice Hunt also dissented. He criticized the majority's legal reasoning, saying "a wealth of case law indicates that although federal and state courts have no jurisdiction over solely internal ecclesiastical affairs or the validity of religious beliefs, they may exercise jurisdiction over torts incurred by religious institutions and in church controversy which impinges on property or civil rights." He continued, "In the present case the application of the tort of good faith and fair dealing to the church-operated school does not require a determination of the validity of a religious belief. A clergy administrator's role, in itself, does not bar application of the tort of good faith or any other common law tort."

Brinkman v. State of Montana, et al. (1986) 224 Mont. 238, 729 P.2d 1301

When this case came before the Supreme Court, the sole question concerned whether a person may be

barred from suing for wrongful discharge because he or she has failed to exhaust contractual remedies under a collective bargaining agreement. On that point, the Court affirmed summary judgement by the district court in favor of the employer.

Albert Brinkman was a correctional officer at the Montana State Prison. In June, 1982, he suffered an industrial injury; he applied for and received workers' compensation. Over the next year, he took leave from his job several times, citing a continuing disability from the injury. In July, 1983, he had been on leave for several months. The prison sent him a letter requesting that he submit some leave forms and a doctor's statement. The prison set a deadline for the return of the forms, after which it would consider Brinkman on unauthorized leave subject to discharge.

Brinkman stated the forms were not enclosed with the letter. His wife said the prison extended the deadline and promised to send the forms; she said the forms never came. In any event, Brinkman did not provide the requested information by either deadline.

In August, Brinkman went to the prison with a doctor's statement releasing him to return to work. The prison told him he had been fired and could not enter the prison. At that time, Brinkman tried to contact a union representative who was at work in the prison. The gate guard made a number of calls to the representative for Brinkman, but the representative never showed up. Finally, Brinkman left the prison; he made no further attempt to contact the union.

Brinkman filed suit against the state, claiming the prison had 1) fired him in retaliation for his industrial injury, and 2) violated the covenant of good faith and fair dealing. The prison asserted that Brinkman could not sue, since he had not used the grievance procedure in collective bargaining agreement.

The Court found that 1) Brinkman was a member of the union; 2) the union said he was covered by the collective bargaining agreement as long as he was an employee; 3) the prison considered him an employee until the time of his discharge, and 4) the contract grievance procedure was available to challenge discharge. Given these facts and several precedents, the Court held that Brinkman could not sue in court without having gone through the grievance procedure first.

In addition, the Court refused to consider Brinkman's claim that the prison had breached the covenant of good faith and fair dealing. "In this case, the [collective bargaining agreement] provided that the employer could only discharge employees for 'just cause.' Therefore, we will not imply the covenant of good faith and fair dealing into this employment relationship." The Court reasoned that the covenant applies to at-will employment situations; where the employment is covered by an explicit contract (the collective bargaining agreement), no other covenant need be implied.

Smith v. Montana Power Company (1987) *225 Mont. 116, 731 P.2d 924*

This case bears some similarity to the *Brinkman*case above. John Smith began employment near the end of 1981 as an instrument and control journeyman for MPC at Colstrip. During his employment, he belonged to the electrical workers union. In September, 1982, he was fired.

Smith claimed that he tried to file a grievance under the collective bargaining agreement, but that MPC refused to discuss the case with the union representative. The company claimed that Smith failed to exhaust the grievance procedure. District court granted summary judgement to MPC as a matter of preemption, i.e., federal labor law preempted Smith's tort claim under state common law.

On appeal, the Supreme Court found that "the issues surrounding Mr. Smith's discharge are questions of federal contract interpretations." The Court concluded "that the District Court did not err in holding that Mr. Smith's negligence and good faith claims were preempted by federal law. This decision is necessary to insure a unified body of labor-contract law and preserve the central role of arbitration in labor disputes." As a final note, the Court cited the *Brinkman* case (above). Although district court had ruled on the basis of preemption, the Supreme Court noted that the failure to exhaust a grievance procedure, as in *Brinkman*, might also apply.

City / County of Butte-Silver Bow v. Montana State Board of Personnel Appeals (1987) *225 Mont. 286, 732 P.2d 835*

In this decision, the Court reviewed a decision by the Board of Personnel Appeals that was just one part of a long legal battle. Gale Wood was a police officer in Butte-Silver Bow; he was fired after a

hearing before the Butte-Silver Bow Law Enforcement Commission. He filed for judicial review and ended up taking it to the state Supreme Court, which affirmed the process and upheld the firing.

As all that was going on, Wood worked with his union to grieve the firing. Butte-Silver Bow refused to process the grievance, saying Wood's statutory remedy under the Metropolitan Police Act was the exclusive remedy for the dispute. (The Act provides the process described in the previous paragraph.) Wood's union filed an unfair labor practice complaint with the Board of Personnel Appeals. The board's hearing examiner ordered Butte-Silver Bow to process the grievance. Butte-Silver Bow appealed to the full board, which affirmed the examiner's findings. Butte-Silver Bow filed for judicial review in district court; the court affirmed the board. Butte-Silver Bow appealed.

The Supreme Court framed the issue as "whether the grievance procedure in the ... collective bargaining agreement ... provides a remedy ... in addition to that set out in ... the Metropolitan Police Act." The Court found that the collective bargaining agreement specifically incorporated the Metropolitan Police Act and did not provide a grievance procedure for termination. Thus, under the terms of the agreement, Wood's case would have to procede under the Metropolitan Police Act. It did, so Butte-Silver Bow did not commit an unfair labor practice.

The Court's decision was four – three. Justice Sheehy dissented, with concurrence from Justices Hunt and Morrison. In the dissenting interpretation, Sheehy said, "Nothing in the collective bargaining agreement excluded, withdrew or canceled the right of the employee to found a grievance on the termination proceedings before the police commission ..." If Butte-Silver Bow disagreed with using the grievance procedure, reasoned Sheehy, "under the grievance procedure it could refere that question to an arbitrator. ... Instead it chose to breach its grievance procedure agreement ... and was thereby guilty of an unfair labor practice."

Drinkwalter v. Shipton's Supply Company, Inc. (1987) *225 Mont. 380, 732 P.2d 1335*

This case involves allegations of sexual harassment surrounding a voluntary termination. At issues was whether the plaintiff had to pursue remedies under the Human Rights Act or could bring an independent tort action. The decision here prompted legislative action, and the Supreme Court upheld that change in *Harrison v. Chance* (see p. 50).

Pam Drinkwalter worked for Shipton Supply from October, 1980, to July, 1983. Her supervisor was Greg Carroll. In July, 1983, Drinkwalter quit her job after complaining to Carroll's brother, also a supervisor in the company, about sexual comments and actions by Carroll. In October, 1984, she filed suit, claiming sexual harassment, breach of the covenant of good faith and fair dealing, and negligence.

Shipton Supply moved for summary judgement; it argued that Drinkwalter's complaint of sexual harassment fell under the Human Rights Act. Under that act, a complainant must press an action with the Human Rights Commission or receive a "right to sue" letter from the HRC. Without the letter, no action can be brought in court. In addition, the Human Rights Act sets a 180-day statute of limitations; Drinkwalter made her first complaint 16 months after the harassment — and her employment — ended. District court granted summary judgement, and Drinkwalter appealed.

The Supreme Court looked at the similarity between the Montana and federal antidiscrimination statutes. The Court also acknowledged that federal courts have defined sexual harassment as a form of sex discrimination, subject to statutory remedies. However, said the Court, "Traditional remedies for sexual harassment are rooted in common law. Since there is no federal common law remedy for sexual harassment, it is defined and treated as sexual discrimination." The Court continued, "Such is not the situation in Montana."

The Court found three bases for allowing a sexual harassment complaint to proceed in common law. First, Article II, § 4 of the Montana Constitution provides for the protection of every person's dignity. Second, the Court "has recognized a cause of action for a discharge from employment which violates public policy. Sexual harassment is against public policy." Third, the Court stated, "Good faith and fair dealing preclude sexual harassment."

The Court thus held that "the facts alleged by Pam Drinkwalter could support common law theories rooted in tort law distinct from and in addtion to sexual discrimination charges covered by Montana's Human Rights Act. To hold otherwise would result in the elimination of established common law causes of action. Absent a clear indication of the legislature's intent to abrogate existing common law remedies, we must construe new statutory remedies as existing in addition to, rather than instead of, the common law remedies." The Court reversed summary judgement and remanded the case.

Justice Gulbrandson dissented. He would view sexual harassment as a form of sex discrimination. Accordingly, "the exclusive remedy for that harassment is provided by the [Human Rights] Act. There is no common law remedy for sexual harassment, in and of itself, in Montana."

Kerr v. Gibson's Products Company of Bozeman (1987) *226 Mont. 69, 733 P.2d 1292*

Penny Kerr worked five and one-half years for Gibson's, starting in 1978. Gibson's terminated her employment in what it said was a lay-off for economic reasons. Kerr had performed satisfactorily throughout her employment, advancing from her initial clerk position to department head. She never received disciplinary action, but did receive a bonus in 1983.

Beginning in 1980, Gibson's went through a period of economic difficulty. In February, 1984, the company terminated Kerr during her shift, without notice or severance pay. Contrary to policies stated in its handbook, Gibson's did not offer a transfer, reduced hours, or reduced pay, nor did it provide recall rights. The handbook also promised layoffs would occur without prejudice, yet it placed "No Rehire" in Kerr's termination report. It refused to provide her a reference letter. Gibson's called the action a reduction in force, yet replaced Kerr within four months with a lower paid employee.

Kerr sued and won her case in district court. Gibson's appealed. The Supreme Court found that Gibson's handbook and other "objective manifestations" in Kerr's employment implied the covenant of good faith and fair dealing. "As an employer, Gibson's was freely able to enforce employee handbook rules of conduct. It likewise follows that Kerr, as an employee, could reasonably rely on the procedures outlined in Gibson's employee handbook during employment termination." Citing *Gates* (see p. 5) and *Dare* (see p. 9), the Court upheld the trial court's procedures. On a second issue, the Court upheld the compensatory damages ($59,026) awarded by the jury. The award included "prospective pay" through 1989, when Kerr had planned to start raising a family. It also included Kerr's share of Gibson's profit-sharing plan, which was disbursed after her termination when Gibson's sold out to another company. Here, the Court affirmed expert testimony that guided the jury in setting the amount of compensatory damages.

McClain, et al. v. NERCO, Inc., & Spring Creek Coal Co. (1987) *227 Mont. 393, 738 P.2d 1285*

NERCO/Spring Creek mined coal at Decker. Their major contract customer was a group of Texas utilities, the "Houston Group." On July 15, 1982, the Houston Group filed suit against NERCO and Spring Creek seeking to permanently reduce the amount of coal it had to accept monthly under contract. On July 21, the parties to the suit negotiated a tentative settlement allowing reduced quantities of coal. On July 23, Spring Creek laid off half of its work force. On July 28, NERCO, Spring Creek, and the Houston Group signed an Interim Agreement allowing dismissal of the Houston Group lawsuit.

After the lay-off, 65 coal miners filed suit against NERCO and Spring Creek. They sought relief under a number of different theories. In time, settlement was reached on all issues save one: the miners alleged in a "fourth amended complaint" that Spring Creek had assured them of job security based on the long-term coal contract. Further, they alleged that NERCO, Spring Creek, and the Houston group conspired to bring a sham lawsuit, creating grounds for the massive lay-off. This conspiracy, plaintiffs said, constituted a breach of the implied covenant of good faith and fair dealing.

District court granted summary judgement to NERCO and Spring Creek, and the plaintiffs appealed. At issue before the Supreme Court was whether the district court had erred in granting summary judgement.

First, the Supreme Court disposed of the issue of implied job security. With the fourth amended complaint, all parties had agreed to dismiss with prejudice all other claims arising in the suit. Since the fourth amended complaint dealt only with the conspiracy claim, the issue of job security could not be considered.

As evidence to support the conspiracy theory, the miners offered only the timing of the events occurring in quick succession: 1) Houston Group filed lawsuit, 2) NERCO and Spring Creek negotiated with the Houston group, 3) Spring Creek laid off employees, and 4) NERCO, Spring Creek, and the Houston group reached an Interim Agreement. NERCO and Spring Creek presented extensive documentation that its financial crisis was real and the Houston Group lawsuit was genuine. The Supreme Court concluded, "plaintiffs have not presented any evidence of a conspiracy. There is no genuine issue of material fact." Thus, the grant of summary judgement was affirmed.

Nordlund v. School District No. 14, et al. (1987) *227 Mont. 402 , 738 P.2d 1299*

James Nordlund began teaching at Malta High School in 1956. In 1966, he became district superintendent, under written contract with the school board. From 1966 to 1983, Nordlund worked under a series of two-year contracts. In January 1983, the school board offered a one-year contract for the 1983-84 school year. The contract contained no option for renewal, nor did it refer to the possibility of renewal.

In January, 1984, the school board decided not to renew Nordlund's contract beyond June 30, 1984. It took this action in full compliance with state law. Nordlund sued the district for breach of contract, breach of the implied covenant of good faith and fair dealing, and negligent infliction of emotional distress. He then amended his complaint to say that the contract was "open-ended," rather than for a definite term, and that the school board had violated the Open Meetings Law when it voted not to renew his contract. District court dismissed the lawsuit, noting the plaintiff failed to state a claim on which relief could be granted. Nordlund appealed, saying the district court erred in interpreting his contract as an express contract for one year.

The Supreme Court noted that "[w]here the language of a written contract is clear and unambiguous there is nothing for the court to construe." Further, the Court said, "[c]ourts have no authority to change the contract or disregard the express language used." The Supreme Court agreed with district court that "the contract [was] sufficiently clear and unambiguous in its intent." Further, the Court noted, since superintendents may not acquire tenure in their positions, no implication for renewal could be read into the contract. Thus, the dismissal was correct, for "[t]here was no ambiguity for which the district judge was required to submit the case to a jury for a factual determination."

On the breach of covenant issue, the Supreme Court reiterated that the school board followed all its legal obligations in dealing with Nordlund's contract. "[B]ecause no breach of contract occurred, it cannot be said that the school board breached the implied covenant of good faith and fair dealing." In affirming the lower court's dismissal, the Supreme Court agreed that "no set of facts would support Nordlund's claim of a contract for an unspecified term, or 'open-ended' term ...."

Anderson and Anderson v. TW Corporation, et al. (1987) *228 Mont. 1, 741 P.2d 397*

Robert Anderson was employed in the garage operated by TW Services in Yellowstone National Park. he began work in 1970, and from 1971 until his resignation in July, 1982, he served as shop foreman. Throughout his employment, he was a member of the International Association of Machinists and Aerospace Workers union. In June, 1982, Anderson was involved in the clean-up of a degreaser (Tensene) spill. He developed a skin allergy from contact with the substance and went on sick leave. His doctor advised him to avoid all contact with petroleum products.

While Anderson was on sick leave, the company changed his job description, requiring 75% mechanic work and 25% supervisory work. This change would make it unavoidable for Anderson to come into contact with petroleum products. The union represented Anderson in a grievance, and by mutual agreement, the company would return Anderson to his former position. Anderson continued to object to the job description but said the union refused to proceed any further with his claim. Anderson quit and filed suit against the company, alleging "constructive discharge." In the same suit, his wife, Violet Anderson, stated a claim for damages due to emotional distress and mental anguish resulting from the company's actions with her husband.

District court granted summary judgement to TW Services on all issues of the suit, stating that Anderson's claims were preempted by federal labor law. Anderson appealed. The Montana Supreme Court cited U.S. Supreme Court decisions and its own decisions in affirming the district court decision (see *Brinkman* and *Smith*, pp. 17 and 18). The Court cited the U.S. Supreme Court's findings that "plaintiffs may not avoid the preemptive effect of federal labor law when a dispute involves an interpretation of a union contract by pleading in tort."

Barnes v. Koepke and Big Springs and Glacier County (1987) *260 Mont. 470, 736 P.2d 132*

This lawsuit was brought against Glacier County and two of its commissioners by Ronald Barnes, the discharged administrator of the hospital in Cut Bank. Barnes, however, was not a county employee; he had been hired by Brim and Associates, a hospital management firm under contract to the Glacier County Hospital Association, a non-profit corporation leasing the hospital from the county. Barnes began his tenure as administrator in 1981. Very quickly, disagreement and dissension arose between Barnes and much of the hospital staff. In October, 1983, the hospital staff demanded that the Hospital Association fire Barnes, but it refused to do so.

On June 30, 1984, the county commission voted to not renew its lease with the Hospital Association. Subsequently, Brim and Associates fired Barnes. Barnes's lawsuit against the county alleged that the commissioners' personal dislike of him led them to terminate the lease for the sole purpose of securing Barnes's discharge.

In district court, the defendants moved for and received a dismissal. The basis of this action was the legislative immunity statute (2-9-111, MCA), which at that time read:

> **Immunity from suit for legislative acts and omissions.** (1) As used in this section: (a) the term "governmental entity" includes the state, counties, municipalities, and school districts; (b) the term "legislative body" includes the legislature vested with legislative power by Article V of the Constitution of the State of Montana and any local governmental entity given legislative powers by statute, including school boards.
> (2) a governmental entity is immune from suit for an act or omission of its legislative body or a member, officer, or agent thereof.
> (3) A member, officer, or agent of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with the introduction or consideration of legislation or action by the legislative body.

The Montana Supreme Court upheld the dismissal, saying that the statute clearly provides immunity for the county and the commissioners. The decision not to renew the lease was clearly a legislative action. Barnes tried to make the case that acts committed in bad faith and with malice should not be considered the "lawful discharge of an official duty." The Court refused to examine the motives for the commission's action; the commission had the authority to renew or not renew the lease, so it was immune from lawsuit.

*(**NOTE:** The 1991 Legislature amended § 2-9-111, MCA, to effectively remove the shield in wrongful discharge situations. A text of the amended law is appended to this summary. The amendments likely would not have changed this ruling, though.)*

Belcher v. Department of State Lands (1987) *228 Mont. 352, 742 P.2d 475*

Herb Belcher was hired in September, 1980, as a communications engineer for the Department of State Lands's Fire Suppression Bureau in Missoula. In 1982, his supervisor began receiving complaints about Belcher's work. Among other allegations, the complaints stated that Belcher's work on the statewide communication plan he was responsible for was inadequate. Belcher received a disciplinary memo in January, 1983, concerning the private use of a state vehicle.

In April 1983, Belcher was told to concentrate on the statewide plan to the exclusion of all other work activities. Problems continued with Belcher's work, and his supervisor continued to document all evidence that came to his attention. In January, 1984, Belcher was given a notice of corrective discipline. It informed him of the grounds for disciplinary action, what improvements were needed, and the possibility of termination if his work did not improve. Belcher was given 60 days to correct his performance deficiencies and became subject to weekly performance evaluations. Belcher's performance did not improve, despite frequent meetings with his supervisor. In April, 1984, the department fired Belcher.

Belcher filed suit against the department in February, 1985, alleging that the department fired him without just cause. He further claimed that the department violated public policy, breached its contract of employment with him, and breached the covenant of good faith and fair dealing. District court granted summary judgement in favor of the department. On appeal, the Montana Supreme Court agreed: "Belcher was not doing his job; he had received notice that his work was not adequate; he failed to rectify the situation, and he was subsequently discharged. It appears to us that no basic question of fact exists for jury determination and Belcher does not raise any specific fact question."

The Court went on to conclude that "[s]upervisors had issued reprimands, notices of corrective discipline, and notices of punitive discipline throughout Belcher's 43 months of employment. He had the chance to rebut these charges, but chose not to do so. He had the right of grievance, but failed to exercise it. Furthermore, Belcher was unable to show the District Court that public policies were affected by dismissal other than his own belief that just cause was violated."

"It is clear from the record, the deposition of Belcher, and Belcher's own conduct that he knew his job was in jeopardy. The Department repeatedly attempted to help him until the situation was out of control. These particulars represent notice to Belcher that he had to improve or risk discharge. The Department recognized the duty to act in good faith and abided by it."

Malloy and Malloy v. Judge's Foster Home Program, Inc. and Vaughan (1987)
229 Mont. 317, 746 P.2d 1073

From 1982 to 1985, Tom and Harriet Malloy worked under contract as group home parents at Discovery House, a group home operated in Anaconda by Judge's Foster Home Program. In 1985, Judge's contracted solely with Harriet Malloy; Tom was not a party to the contract nor was he named anywhere in the contract.

In April, 1986, a social worker witnessed an incident in which Tom Malloy verbally abused a client in the group home. Harriet Malloy was also present. The social worker filed a complaint with the Discovery House Director, Sister Gilmary Vaughan. Harriet Malloy was suspended, pending an investigation by the Department of Social and Rehabilitation Services, which licensed the program. SRS found Tom Malloy culpable for the abuse and Harriet Malloy negligent for not intervening. Sister Vaughan then sent Harriet a letter, outlining conditions for continued employment and directing her to return to work a week later. Harriet did not agree with the letter and did not return to work as directed. She asked for a hearing on the complaint against Tom, but Discovery House refused to grant one. About three months later, Discovery House terminated Harriet's contract for her continued refusal to return.

The Malloys filed suit, alleging breach of contract , violation of public policy (denial of due process), and breach of the covenant of good faith and fair dealing. District court dismissed the suit, and the Malloys appealed. The Supreme Court upheld the dismissal. Tom Malloy had no grounds to sue; he was not a party to the contract between Discovery House and Harriet, and there was no other employment relationship involving him. On Harriet's claim, the Court pointed out that "[i]t is a well settled rule of contract law that a party who commits the initial breach cannot complain of a subsequent breach by the other party." Since Harriet breached the contract by not reporting to work as directed, she had no grounds to complain that Discovery House had breached the contract by terminating it.

Since Discovery House had refused Harriet a hearing, she claimed that her due process rights had been violated. She asserted that the written contract granted her a property interest, entitling her to due process prior to termination. The Supreme Court refused to go along, saying she had shown no "independent source" that would establish a property interest. Finally, on the issue of breach of the covenant of good faith and fair dealing, the Court held that Discovery House had made several efforts to resolve the situation fairly with Harriet Malloy, but she had refused to cooperate. Her refusal to return to work constituted a "legitimate business reason" for discharging her.

Riley v. Warm Springs State Hospital, et al. (1987) *229 Mont. 518, 748 P.2d 455*

Michael Riley worked for two months as a psychiatric aide at Warm Springs State Hospital. In July, 1979, he was discharged while still on probationary status. The hospital claimed the reasons for termination were excessive absenteeism and sleeping on the job. Riley attempted to file a grievance through the union that represented him, but was told that the time period for grieving the dismissal had expired. He did, however, receive a meeting of himself, management, and union representatives. The hospital restated its reasons for termination and presented its supporting evidence. The union representatives agreed that the termination was justified. Riley's discharge was made final.

Riley filed suit in March, 1980, and the case came to trial in February, 1986. The jury found for Riley and entered separate awards of $18,343 each against the hospital and the union. The jury based it verdict on a breach of the covenant of good faith and fair dealing, even though the discharge occurred in 1979, and the covenant was first recognized by the Montana Supreme Court in 1982. The hospital appealed.

Actually, two cases came under consideration: 1) the *Gates* case (see p. 5), which established the covenant of good faith and fair dealing, and 2) the *Brinkman* case (see p. 17), which barred a claim of breach of the covenant when plaintiff was covered by a collective bargaining agreement. The hospital objected to retroactive application of the covenant, and Riley objected to the possible retroactive application of the *Brinkman* principle.

The Supreme Court discussed nonretroactive application of a decision, saying three conditions must be met: 1) the decision establishes a new principle of law by overruling precedent or by deciding an issue with a result "not clearly foreshadowed"; 2) the new rule must be examined to see if retroactive application will "further or retard" its operation; 3) the court must consider the "equity of retroactive application."

In reaching its decision, the Court stated, "Although it can be argued that both *Gates* and *Brinkman* established new principles of law, it can also be argued that both principles were clearly fore-

shadowed." On the second condition, the Court said, "[R]etroactive application will further the operation and purpose of the rules set out in both *Gates* and *Brinkman*." On the third condition, the Court cited that both Gates and Brinkman were terminated before their respective lawsuits resulted in the new principles of law. "We conclude that to have retroactively applied the rules in the two previous cases and not to apply them in this case would be clearly inequitable."

The Court concluded its decision by saying the covenenant of good faith and fair dealing did apply retroactively, except that Riley's claim was barred by a retroactive application of the Brinkman principle. The jury award to Riley was overturned.

Stark v. The Circle K Corporation (1988) 230 Mont. 468, 751 P.2d162

A unique aspect of this case revolved around the company's use of an "at-will clause" on its employment application form. The Supreme Court rejected this tactic as a way of absolving the employer from its obligation under the covenant of good faith and fair dealing and noted the employer still would need to show "a fair and honest reason" for the termination in order to successfully defend it.

Circle K hired Greg Stark in Butte in December, 1981. The company's application contained an "at-will clause," which stated, "subsequent to being employed, I may be dismissed with or without cause." Stark apparently performed well with Circle K, receiving several promotions and raises. By November, 1983, he was zone manager, in charge of eight stores.

Throughout Stark's employment, he received regular evaluations. He consistently received "very good" to "superior" ratings, and the district manager rated him the best zone manager. However, the blossom wilted. The district manager became concerned about inventory shortages in the district, and he specifically addressed severe shortages at three of Stark's stores. In August, 1984, he met with Stark and presented him with a written "Employee Counseling Report" that cited the inventory shortages and placed Stark on a 30-day probation. Stark refused to sign the report, saying other zone managers had shortages but were not receiving the same treatment.

A few days later, Stark attended a regular managers' meeting, but no mention was made of the inventory problems. On August 22, the district manager again met with Stark and presented the counseling report for Stark to sign. Stark again refused and was fired for insubordination in his refusal to accept responsibility for the inventory shortage.

At trial in the subsequent lawsuit, several factual discrepancies surfaced. The district manager said he had not preplanned Stark's termination, yet he had come to the meeting with Stark's final paycheck and had brought along another manager to drive Stark's company vehicle back to Great Falls. The amount of inventory shortage came into question. The district manager had told Stark he would look into the inventory figures, but he never did. Stark rechecked the figures and found inaccuracies; the evidence at trial supported his position. The district manager also appeared not to have followed the Circle K progressive disciplinary policy. In addition, the district manager testified that an employee does not have the right to refuse to sign a counseling report; Stark, the company's personnel expert, and a higher company manager all testified that company policy allowed such refusal. Evidence at trial also confirmed Stark's allegations that other zone managers in the same district had significant inventory shortages without receiving discipline. In its verdict, the trial jury said the company had breached the covenant of good faith and fair dealing and awarded Stark $200,000 compensatory damages and $70,000 punitive damages.

Circle K moved for a judgement notwithstanding the verdict and for a new trial. The district court denied both motions, the company appealed. The company complained that insufficient evidence was present to support the breach of covenant finding. Thus, the motion for judgement n.o.v. was improperly denied. The Supreme Court disagreed, saying, "A court will not substitute its judgement for that of the jury. Evidence may be inherently weak and still be sufficient to uphold a jury verdict."

Circle K also contended that the at-will clause on its employment application was a contractual provision that precluded a breach of the covenant. The Court countered that the covenant "is implied as a matter of law based on the public policy of this State. It does not depend on contractual terms for its existence, nor is [it] subject to contractual waiver, express or implied." In addition, the Court said that several "objective manifestations" existed that established the covenant between Circle K and Stark.

Circle K argued, in the alternative, that it did have good cause to fire Stark. It claimed that good cause should be determined by the employer and not be subject to review by a jury. The Court

disagreed, describing the covenant as "designed to prevent the abuses of unfettered discretion inherent in a situation of unequal bargaining power. An employee is not required to leap at his master's every command." On the main issue of termination, the Court said, "We will not require an employee to sign a written statement he believes to be false so that an employer can later justify termination."

"To rebut Stark's allegation," the Court continued, "Circle K need only have shown a fair and honest reason for termination. Circle K apparently failed to do so, however. Contrary to Circle K's assertion, the jury, as the trier of fact, does determine whether good cause existed." In examining the record, the Court noted that the district manager "was impeached on several matters, that his testimony conflicted with prior testimony given at an unemployment compensation hearing, and that his testimony conflicted with the documentary evidence." Coupling this with the fact that "[t]he jury as trier of fact, determines the credibility of a witness and the reason for termination," the Court concluded, "[T]here is sufficient credible evidence to support the jury verdict."

Other issues of appeal concerned the amount of damages and method of determining them. In addition, Circle K claimed that an absence of proof ruled out the punitive damages awarded Stark. The Court cited the Flanigan case as precedent and said, "The apparent lack of candor on the part of [the district manager] is sufficient for the jury to have inferred malice." In sum, the Supreme Court affirmed every issue on appeal from the district court.

Nasi v. State Department of Highways (1988) 231 Mont. 395, 753 P.2d 327

Larry Nasi began working for the Department of Highways (DOH) at Townsend in February, 1979. In June, 1982, the employment ended. Nasi claimed he was fired; DOH claimed he voluntarily quit. In March, 1984, Nasi filed a grievance with the state Board of Personnel Appeals (BPA). In April, 1984, he filed a tort action against DOH in district court. The court stayed this lawsuit until the BPA grievance was complete.

Nasi's BPA grievance proceeded from preliminary findings through a full hearing to a judicial review. He lost at every step; the finding was that he had voluntarily quit. Nasi did not appeal the judicial review from district court. In August, 1986, district court lifted the stay on Nasi's tort action, and in June, 1987, the court granted summary judgement to DOH on the grounds that the matter was *res judicata.*

Res judicata is a legal doctrine of judical finality: "a party should not be able to relitigate a matter he or she has already had an opportunity to litigate. This policy reflects the notion that a lawsuit should not only bring justice to the aggrieved parties but provide a final resolution of the controversy."

On Nasi's appeal of the summary judgement, the Supreme Court held that *res judicata* had been correctly applied: "*Res judicata* applies when administrative proceedings possess a judicial character." The BPA grievance, resulting in a full evidentiary hearing, was judicial in character and under the law. Since Nasi's lawsuit and grievance both involved the same issues and facts, the Court would "not allow Nasi to relitigate his grievance in a tort action raising the same issue previously litigated."

Meyers v. Department of Agriculture (1988) 232 Mont. 286, 756 P.2d 1144

William Meyers worked for two months as a potato inspector for the Department of Agriculture. After his termination, he filed a grievance with the department; he received $671 as a result of a grievance panel recommendation in his favor. He also received $184 in unemployment benefits.

Meyers was dissatisfied with the grievance outcome and filed suit. The case came to trial, and the jury awarded him $850 in damages. The district court offset the award by the $671 he had already received from the department and $179 of the sum he had collected in unemployment. Meyers appealed on three issues: 1) the offset, 2) a partial summary judgement before trial that precluded an award of wages he might have earned, and 3) an attempt to recover penalties, court costs, and attorney fees. He lost on all three issues.

On the first issue, the Supreme Court relied on the district court's statement that Meyers and the Department had agreed to the offset prior to the trial. Meyers did not refute this statement. On the second issue, Meyers relied on three statutes regarding payment of wages (39-3-204 – 206, MCA). However, the Court ruled, based on the *Como* case (see p. 8), that the laws apply to wages already earned and owed to the employee at the time of termination, not to wages that might have been earned

had the termination not taken place. On the third issue, Meyers sought penalties and other costs under the same statutes (39-3-204 – 206, MCA). This issue was already decided, and the Court disagreed with Meyers that there were any other grounds for awarding penalties and costs.

Janz v. Quenzer, d/b/a Ben Franklin Store (1988) 232 Mont. 440, 756 P.2d 1174

Alma Janz and her daughter, Roxanne, worked at the Ben Franklin store in Baker. The owner was in the process of selling the store to Duane Quenzer, who told Janz he planned to keep her on as an employee when he became owner. Prior to the sale being final, the seller and buyer agreed to take inventory to establish its value. Janz helped take inventory, under the employ of the seller. On November 4, 1983, inventory was completed or near completion, and Alma and Roxanne showed up for work. Quenzer told Roxanne she couldn't wear jeans to work. An argument ensued, and the two women walked out. Quenzer asked Alma Janz for her keys to the store; she refused, saying they belonged to the seller.

Alma Janz sued for wrongful discharge, alleging breach of public policy, of an express contract for employment, and of the covenant of good faith and fair dealing. District court granted summary judgement for Quenzer on the grounds that he did not own the store and did not employ Janz at the time she walked out. On appeal, the Supreme Court noted, "The resolution of this issue depends on the existence of a material question of fact on whether Quenzer employed or contracted to employ Janz," since a material question of fact would preclude summary judgement and send the case to trial. The Supreme Court agreed with district court that "no reasonable inference may be drawn that either the contract or the [employment] relationship existed."

Although Janz made several points to show that Quenzer was in control of the store and employed her, the Court rejected each of them in favor of four undisputed points asserted by Quenzer: 1) he did not yet own the store the morning of November 4, 1983; 2) the seller paid Janz's wages through November 3, 1983; 3) a Ben Franklin franchise representative was in control of the store during inventory, and 4) Janz refused to give Quenzer the keys, saying they belonged to the seller.

Bieber v. Broadwater County and Duede (1988) 232 Mont. 488, 759 P.2d 145

*(**NOTE:** The 1991 Legislature amended § 2-9-111, MCA, to effectively remove the shield in wrongful discharge situations. A text of the amended law is appended to this summary.)*

This case further defined the immunity from lawsuit provided to legislative bodies by § 2-9-111, MCA (see *Barnes* case, p. 21). James Bieber worked for the Broadwater County road crew, starting as a part-time employee in September, 1983, and moving to full-time in April, 1984. William Duede was a county commissioner who supervised the road crew — assigning work, hiring, and firing. In February, 1986, Duede fired Bieber for abusing county road equipment. He did not consult with the other commissioners before taking the action, but later told them what had happened. They concurred with his action.

Bieber sued the county and Duede for wrongful discharge. District court granted summary judgement in favor of the defendants on the basis that they were immune from lawsuit under the statute. On appeal, Bieber argued that the law covers purely "legislative" acts and excludes day-to-day "administrative" acts, such as Duede's management of the road crew. The Supreme Court refused to recognize the difference "because the plain language of the statute makes no such distinction." Bieber secondly contended that Duede, in firing Bieber, was not discharging an official duty associated with "the introduction or consideration of legislation or action" by the county commissioners. The Court said "Duede clearly had an official duty to oversee and administer the maintenance and repair of county roads ... In firing Bieber, Duede was discharging his lawful duty as commissioner. He cannot be sued for that action under the current law."

Finally, Bieber challenged the constitutionality of § 2-9-111 on the basis of equal protection and access to the courts. The Montana Constitution guarantees citizens access to the courts for redress of wrongs done to them. The Supreme Court stated, "[A]ccess to the courts is not an independent fundamental right." Since a fundamental right is not involved, the Court need only find a rational basis for the law that excludes some employees from suing. The Court held that the reason for legislative immunity "is to insulate a decision or law-making body from suit in order to prevent its decision- or law-making processes from being hampered or influenced by frivolous lawsuits. This reason satisfies the rational basis test." Thus, the Court affirmed summary judgement against Bieber.

Frigon v. Morrison-Maierle, Inc., Enright, and Larsen (1988) *233 Mont. 113, 760 P.2d 57*

Morrison-Mairle is a consulting engineer firm with headquarters in Helena. This dispute arose in its Billings office. Lorraine Frigon began working as a part-time secretary in January, 1984. Morrison-Maierle gave her a handbook, which explained, in part, that employees receive annual performance reviews and salary reviews. Frigon was informed she would receive her first reviews after six months. In July, 1984, Bill Enright told Frigon she was due a merit raise, but he didn't have time to do a performance review. In October, 1984, Frigon asked for and received a performance review from Larry Larsen. A month later, Philip Green became Frigon's supervisor. Frigon asked for an annual performance review in January, 1985, but there was no record it took place.

In July, 1985, Green gave Frigon a performance review; he told her he had recommended a merit raise, but the head office had turned it down on the basis of negative comments from Enright and Larsen. Frigon asked that they put their comments in writing. Reluctantly, they did so. Over the course of a few days, Frigon prepared a written response to the comments, gave it to Green, and resigned. Five months later, she filed suit, alleging breach of the covenant of good faith and fair dealing, constructive discharge, slander, and negligent or intentional infliction of emotional distress. District court granted summary judgement in favor of the defendants, and Frigon appealed.

Although Frigon was not fired, she said the defendants had breached the covenant of good faith and fair dealing by refusing to give her performance and salary reviews, as stipulated in policy, and by denying the merit raise on the basis of negative and partially false comments. The Supreme Court didn't buy her argument: "Breach of the covenant of good faith and fair dealing was established as a tort separate from wrongful discharge, but applicable only in cases of employee termination." Since Frigon voluntarily resigned, she had no grounds for breach of the covenant. Had Frigon been able to make a case for constructive discharge, as she alleged, she might have been able to show a breach. But the Court rejected her argument that constructive discharge might have occurred: "Even assuming that [Frigon] correctly states the test for constructive discharge in Montana, the facts do not support her argument."

Frigon also argued that oral and written comments by Enright and Larsen were defamatory. The Court examined the test for defamation and concluded that "there is no evidence to support a holding that [their comments] disgraced or degraded [Frigon] as a matter of law." "Furthermore, a basic tenet of the law of defamation is that an expression of opinion is generally not actionable. ... The facts relied on by [Frigon] to show defamation instead reflect opinions rendered in the context of the evaluation of her performance on the job."

The final issue involved emotional distress. First, the Court pointed out that "[e]motional distress under Montana law has been and remains primarily and element of damages rather than a distinct cause of action." However, the Court examined Frigon's arguments and concluded, "There is no evidence in the record ... which would support a claim for intentional infliction of emotional distress. The comments made by Enright and Larsen, and the failure of Morrison-Maierle to give [Frigon] a raise are hardly instances of conduct that goes 'beyond all possible bounds of decency.' Nor has [Frigon] presented facts showing a substantial invasion of her legally protected interests. The law has yet to protect a person's interest in receiving a merit raise."

The Court affirmed summary judgement. So, not only did Frigon "lose the lawsuit," she also had to abide by a part of the judgement that required her to pay the costs of litigation (up to summary judgement) to Morrison-Maierle.

Oedewaldt v. J.C. Penny Company, Inc. (1988, federal) *687 F. Supp. 517*

This is a Memorandum and Order from Federal District Court regarding a lawsuit filed by Gisela Oedewaldt against J.C. Penney Co. The court ruled on summary judgement requested by Penney on two main issues: workers' compensation exclusivity and constructive discharge.

Oedewaldt worked at the Penney store in Shelby. She alleged that, beginning in 1974, the manager, Kenneth Pitcock, engaged in actions toward her that eventually led to her nervous breakdown and loss of her job in 1985. Normally, when a worker is injured at work due to negligence or accident, workers' compensation is the exclusive remedy for compensation; "common law damages are not available for injuries negligently or accidentally inflicted by an employer." The court granted summary judgement in favor of Penney for claims based on negligence.

However, Oedewaldt also alleged *intentional* conduct by the manager caused her injury. If proven, such conduct — and the resulting injuries — would not fall under workers' compensation. The court granted Oedewaldt the opportunity to amend her claim to include intentional infliction of emotional distress, with the facts to be decided at trial.

Oedewaldt also alleged wrongful discharge and breach of the covenant of good faith and fair dealing. Penney argued that no discharge or forced resignation occurred, so her claims must fail. Oedewaldt countered that she was "constructively discharged" as a result of Pitcock's actions. The court stated, "Constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. To find constructive discharge, the court determines whether or not a reasonable person in the employee's position and circumstances would have felt compelled to resign."

"No decision of the Montana Supreme Court expressly states that Montana recognizes the concept of 'constructive discharge,'" the court continued. However, the court acknowledged that the Montana Supreme Court had "discussed" the issue in at least one previous case. The federal court's conclusion was "that if presented with the question at issue here, assuming the truth of [Oedewaldt's] factual allegations, the Montana Supreme Court would undoubtedly hold the concept of 'constructive discharge' applicable to her action ..." So the court denied summary judgement on the issue of wrongful discharge and breach of the covenant of good faith and fair dealing, sending the case to trial.

Rupnow v. City of Polson (1988) 234 Mont. 66, 761 P.2d 802

This appeal contested a summary judgement upholding the discharge of a probationary police officer in Polson. William Rupnow began work as police officer in July, 1985. He was to be on probation for at least one year. His supervisor, Ronald Buzzard, told Rupnow that the probationary period "shouldn't be a problem for him," in light of Rupnow's past experience. In September, 1985, Rupnow received a satisfactory performance evaluation. In January, 1986, he received a second evaluation, which noted some areas needing improvement. Rupnow refused to sign the second evaluation and filed a protest with the mayor. In March, 1986, the City fired Rupnow, stating the reasons to him in a meeting and following up with a letter.

Rupnow sued, alleging wrongful discharge, breach of the covenant of good faith and fair dealing, and negligence. District court granted summary judgement to the City, and Rupnow appealed.

On the allegation of wrongful discharge, the Supreme Court said, "To successfully maintain the tort of wrongful discharge, a plaintiff must show that the defendant violated a public policy." Rupnow asserted that the city did not follow its progressive discipline policy: 1) oral warning, 2) written warning, 3) suspension, and 4) dismissal. The Court noted that the same policy states, "It should also be understood that, depending on the nature and circumstances of the violation, the authority in charge may use any disciplinary measure appropriate within their judgement." The City maintained that it used alternative measures, allowed under policy, through oral warnings and written evaluations. The Court agreed and upheld summary judgement on the public policy claim.

With regard to the covenant of good faith and fair dealing, the Court acknowledged it existed for probationary employees (see *Crenshaw,* p. 11), provided the employee could show "objective manifestations" of job security. Rupnow said that the two evaluations and Buzzard's statement that the probationary period shouldn't be a problem for Rupnow established objective manifestations. The Court disagreed, saying that these events did not establish job security. Rupnow also said failure to follow the progressive discipline policy breached the covenant, but the Court had already disposed of that argument. Finally, Rupnow disputed that he had been warned that his probationary status was in jeopardy. While the Court acknowledged that this was a factual dispute, it said, "Oral warnings that an employee's probationary status is in jeopardy are not mandatory." Considering all the evidence, the absence of the warnings, if true, would still not bar summary judgement.

Finally, Rupnow's negligence claim was based in part on the City's failure to follow the progressive discipline policy. Irrelevant, said the Court, as the issue was already decided. Rupnow also said Buzzard was negligent in failing to adequately investigate certain allegations against Rupnow. The Court concluded, "Chief Buzzard obviously did not conduct an investigation to Rupnow's satisfaction; however, Rupnow does not bring forth evidence to raise a genuine issue of material fact that Buzzard was negligent in his investigation." The Supreme Court affirmed the summary judgement in toto.

Barrett v. ASARCO Incorporated (1988) "Barrett I" 234 Mont. 229, 763 P.2d 27

This is a complex case that resulted in a new trial and another appeal (see p. 54). At issue was what evidence and testimony may be allowed to establish the "character" of the discharged employee. In addition, the Court expanded its interpretation of the covenant of good faith and fair dealing, saying that the obligation is binding on the employee as well as the employer.

Robert Barrett worked for ASARCO for 15 years, 10 of those as a foreman. In November, 1983, he injured his back at work. While Barrett was on leave for his injury, ASARCO paid his full salary and covered his medical expenses. He never returned to work. In May, 1984, ASARCO confronted him with a report that he had been seen unloading hay bales while still on disability leave. Barrett denied it, and ASARCO fired him for lying about his physical activities. A year later, Barrett filed suit, alleging breach of the covenant of good faith and fair dealing.

Prior to trial, but shortly after the deadline for completion of discovery, ASARCO learned the names of six witnesses who might have had information about other incidents of Barrett's dishonesty during his employment. After a series of legal maneuvers and shortly after the trial began, district court ruled to exclude this evidence. The jury returned a verdict in Barrett's favor, awarding $338,000 in compensatory damages and $75,000 in punitive damages.

A week after the end of a trial, a woman contacted ASARCO, claiming to have information that contradicted the verdict. The woman's name had come up during discovery, but Barrett had omitted her name as a person with knowledge relevant to the case. She met with ASARCO and signed a statement about a conversation and activities Barrett engaged in while on disability leave. Armed with this new information, ASARCO moved for a new trial. District court denied the motion, and ASARCO appealed on the basis of both the prior excluded evidence and the new information.

The Supreme Court addressed each of the reasons that district court had excluded evidence at the beginning of the trial. A number of legal issues came into play; in a nutshell, the Supreme Court held that the district court should not have excluded the evidence. The Court said the nature of the excluded testimony "directly pertains to the issue of Barrett's honesty with his employer" and is "thus relevant to ASARCO's defense that it terminated Barrett for dishonesty."

In the *Flanigan* case (see p. 13), the Court had ruled that evidence acquired after termination may not serve as additional reasons for the termination. In this case, though, the Court said, "After-acquired evidence, however, may be introduced if relevant to the character of a party when that character is an essential element of the defendant's original defense." The Court reasoned that ASARCO did not seek to introduce the evidence as additional reasons justifying termination, but as evidence of Barrett's character that strengthens ASARCO's defense that Barrett lied about his hay-lifting activities.

"Further," the Court said, "alleged evidence of previous incidents of dishonesty would be relevant to the issue of whether an employee has a reasonable expectation of job security and thus may claim the protection of the implied covenant of good faith and fair dealing." Emphasizing that "the covenant of good faith and fair dealing mandates a reciprocal duty," the Court said, "an employee who breaches his or her duty of good faith and fair dealing may not then complain of unfair dealing by the employer." Therefore, "Barrett cannot claim that ASARCO's alleged sudden, 'underhanded' termination decision was a breach of the covenant of good faith and fair dealing if Barrett himself failed to deal honestly in his job performance with ASARCO." Consequently, evidence of Barrett's alleged misconduct "is relevant to a determination of whether Barrett dealt with ASARCO in good faith."

Having thus disposed of the case and remanded it for a new trial, the Court declined to discuss the issue of the evidence that came to light after the first trial. (This case resulted in another appeal, summarized on p. 54.)

Daly Ditches Irrigation District v. National Surety Corporation (1988) 234 Mont. 537, 764 P.2d 1276

In this case, an employer sued its insurance company for refusing to defend the employer in a wrongful discharge case. Daly Ditches Irrigation District was the employer, which had been sued by a terminated employee. When Daly Ditches tendered the suit to National Surety, the latter refused to take on the case. At issue was the policy wording, which provided coverage for "bodily injury or property damage ... caused by an occurrence ..." Occurrence was defined as "an accident ... neither expected nor intended from the standpoint of the insured."

Daly Ditches argued that breach of the covenant of good faith and fair dealing fell under the definition of "occurrence." It contended that the consequences of the termination were neither expected nor intended. Surety responded that discharge from employment was not an "accident" under the policy language. The Supreme Court recognized that "an intentional act may nevertheless constitute an occurrence where the alleged injuries were not the expected or intended result of the insured's intentional conduct." "However," continued the Court, "the alleged intentional conduct of Daly could be expected to cause the injury claimed by the employee. The allegation is that Daly fired the employee for refusing to violate Montana law. Damages for emotional and mental suffering may be expected to flow directly as injuries from such a discharge."

Daly Ditches also argued that Surety relied only on the employee's legal complaint, and thus failed its duty to investigate the possible claim. The Court disagreed: "[t]here is no evidence that Surety failed to properly investigate the claim at issue. Surety inspected the allegations of the complaint and determined that the employee sought damages flowing from intentional conduct" by Daly Ditches. Thus, the Court sided with Surety that it had no obligation to defend Daly Ditches under the terms of the policy. The case points out that employers need to seek specific coverage for liability stemming from discharge. Such a rider undoubtedly raises the cost of liability insurance.

Bestwina v. Village Bank and Richard Olson (1989) 235 Mont. 329, 767 P.2d 338

This case revolved around circumstances for "tolling" (suspending) the statute of limitations for a claim. Lawrence Bestwina worked as vice-president at the Village Bank in Great Falls. In March, 1977, he began psychiatric treatment for depression. In November, 1977, he was discharged from his job. A couple months later, he was hospitalized for depression, and his condition continued to deteriorate.

A wrongful discharge claim was filed in October, 1985, with Bestwina's wife acting as guardian. The suit was filed nearly eight years after the discharge, and the statute of limitations for tort claims is three years. The defendants moved for summary judgement, saying the statute of limitations had run and the suit was untimely filed. Bestwina said the statute of limitations should be tolled for the period of his mental illness. In addition, Bestwina claimed that the defendants fraudulently concealed the real reason for the termination until October, 1983; therefore, the statute of limitations would not have begun until then. District court granted the defendants' motions for summary judgement.

In considering Bestwina's appeal, the Supreme Court pointed out that a disability, such as mental illness, may toll the statute of limitations. Defendants had contended that Bestwina had pursued social security benefits and workers' compensation during the time of his "disability," and these actions served to show his competence. The Court said, "While we recognize that Mr. Bestwina's pursuit of these claims is certainly proper for consideration on the issue of mental illness, we conclude that the pursuit of the claims does not conclusively establish an absence of serious mental illness." Given all the evidence on record, the Court concluded that "there is a material issue of fact precluding summary judgement." The district court was instructed to determine the periods of Bestwina's disability, and "the total of such time shall not be counted" within the statute of limitations.

On the issue of fraudulent concealment, Bestwina pointed out that Richard Olson underwent deposition in 1983. It was only at that time that Olson stated that Bestwina had, in fact, been fired because of a personal matter between the two men. Bestwina wanted the Court to agree that the statute of limitations on fraudulent concealment commenced when Olson made his deposition. The Court refused to extend the "discovery doctrine" to cover this case. That claim was thus excluded from further proceedings.

Mahan v. Farmer's Union Central Exchange (1989) 235 Mont. 410, 768 P.2d 850

This appeal concerned a number of legal issues involving selection of jurors and admission of evidence and testimony. The outcome was a four–three decision, reversing and remanding for a new trial.

Wayne Mahan worked for Cenex for 30 years. By February, 1983, he was head development engineer at the firm's refinery in Laurel. At that time, his employment was terminated in what Cenex called a reduction in force. He was then 60 years old. Mahan complained to the Montana Human Rights Commission of age discrimination by Cenex. The HRC investigated the case and made a preliminary report in August, 1984. By October, 1984, the case had been pending before the HRC for over a year, and at Cenex's request, the HRC issued a "right to sue" letter. Mahan then filed suit, adding breach of the covenant of good faith and fair dealing to his age discrimination claim.

During jury selection, Mahan's lawyer challenged two jurors "for cause." Both challenges were denied by the district court judge. The lawyer then had to use all his preemptory challenges to exclude the two jurors when, in fact, he would have used them against other selected jurors. Upon examination of the transcript, the Supreme Court held that the district court had erred in denying the challenges for cause. Thus, it ordered a new trial.

The Court dealt with several other issues as well. At trial, both sides used statisticians to debate the claim of age discrimination. The Court emphasized that these experts, on re-trial, could testify only "that their statistical test show or do not show patterns of discrimination based on age, but may not testify to the ultimate conclusion that age discrimination" occurred in Mahan's termination.

During the first trial, Mahan had claimed that the company retaliated against him for suing; it refused to provide a letter of reference and did not include him in company and employee functions. (The HRC investigation had also indicated that Cenex had refused severance pay after Mahan filed his complaint.) The Court noted that such retaliation for filing a complaint with the HRC is prohibited by law. Further, the retaliation "might possibly be considered evidence of bad faith in the original termination as well as in the retaliation. [Mahan] was therefore entitled to instructions to the jury based on his claim of retaliation."

The Court examined other issues of admissable testimony. Primary among these was its agreement with district court that the HRC compliance officer could not be allowed to testify about his investigation of Mahan's discrimination complaint. District court had also excluded the HRC's written report of "reasonable cause." The Court examined both the federal and Montana rules of evidence and concluded, "The very investigation information that the federal rule allows is specifically excluded in the Montana rule." This holding prompted a detailed dissent by Justice Sheehy, who thought that either the report or the testimony (or both) should be allowed as "an aid to the jury."

On one other issue, the Supreme Court affirmed district court's action in excluding evidence offered by Mahan regarding the Cenex's management (or mismanagement) of the refinery. However, the Court did agree that Cenex could offer evidence of the need for its cost containment program that led to the reduction in force affecting Mahan.

Prout v. Sears, Roebuck and Company and McGinnis (1989) 236 Mont. 152, 772 P.2d 288

Tammy Prout began working for the Helena Sears store at the age of 16 in 1979. Her employment application contained the following statement, in part: "[M]y employment and compensation can be terminated with or without notice, at any time, at the option of either the company or myself." She also signed a personal record card that stated, "In consideration of my employment, I agree to conform to the rules of Sears, Roebuck & Co. and my employment and compensation can be terminated, with or without cause and with or without notice, at any time, at the option of either the company or myself."

After two years, Prout received a promotion and a raise. In January, 1983, she became a supervisor and received a large raise. The company agreed that Prout was promoted "because her supervisors were generally satisfied with her job performance." During Prout's seven and one-half years with Sears, the store changed managers five times. At least three of the managers gave Prout evaluations that noted problems with absenteeism and tardiness. In December, 1986, the then-manager, Terry McGinnis, fired Prout for falsification of two payroll time sheets.

Under Sears's payroll system, employees were to report their hours for the full week every Thursday. If an employee were scheduled to work Friday and/or Saturday, he or she would report those hours, even though they hadn't yet taken place. If those hours were not worked, the employee was supposed to teletype corrections to the central payroll office. Prout and two other employees said it was acceptable practice under two prior managers to forego the teletyped corrections and, instead, "make up" the reported hours as compensatory time the next week. McGinnis and other employees disputed this. The weekly time sheets contained the statement, "I have recorded by actual starting and quitting time each day. Any falsification will subject me to immediate dismissal."

Prout filed suit against Sears and McGinnis. Plaintiff and defendants agreed that several issues were to be litigated at trial. However, the defendants moved for summary judgement, and district court granted it, saying,

> "The sole issue decided by the Court is that plaintiff's claims are precluded as a matter of law by the language of the plaintiff's employment application and her personal record card. That language in clear and unequivocal terms notified plaintiff that her employment could be terminated at any time and for any reason, and defeats the claims plaintiff is attempting to assert in this case."

Prout appealed to the Supreme Court. The result was a lengthy opinion that reversed summary judgement. The Court examined the tort exceptions to at-will employment in Montana and noted that Prout's discharge preceded enactment of the wrongful discharge statute. In this case, the Court said, the parties signed a pretrial order "listing what the parties considered eight issues of fact remaining to be litigated." The Court concluded, "These must be resolved to determine whether [Prout's] claims fall into any of the four exceptions to the right of the at-will employer to discharge its employees. This precludes summary judgement."

"At the same time," the Court continued, "we give effect to the employment application and record card. These give the employer the right to fire without cause. They do not give the employer the right to fire for a false cause. If the at-will employer who can fire without cause ... chooses instead to fire an employee for dishonesty, the discharged employee must be given the opportunity to prove the charge of dishonesty false."

Justice Weber filed a lengthy dissent in this case. Besides offering a history of the at-will doctrine, he cited to a 1988 landmark case in California (*Foley v. Interactive Data Corp.).* In essence, the California decision barred punitive damages for breach of the covenant of good faith and fair dealing, saying that the breach should be dealt with only in the context of contract damages. Weber noted that Montana may be the only state that allows breach of the covenant as a distinct tort, but concluded that breach of the covenant "allows recovery only of contract damages and that punitive damages are not recoverable." In Prout's case, Weber would agree with the district court's conclusion that the specific language of her "contract" with Sears precluded any claims by Prout in the absence of a violation of public policy.

Niles v. Big Sky Eyewear, Vainio, and Vanio (1989) 236 Mont. 455, 771 P.2d 114

The defendants in this case include a professional corporation and two brothers, Leonard and David Vainio, who are partners in the corporation. They will be referred to as "Big Sky." Janice Niles began working in Big Sky's Bozeman store in November, 1984. By April, 1986, she had received several raises and was manager of the store. Sometime that month, Niles fell under suspicion of taking money from the till, based on a supposed allegation by another employee. Two corporation officers went to the police, who attempted a "sting," purchasing an item at the store with marked bills. Based on what the officers saw and what they had been told, they arrested Niles that day for misdemeanor theft.

After her arrest, Niles did not return to work at the store. Leonard Vainio promoted his girlfriend to manager. The misdemeanor charges were dropped when Big Sky failed to provide the records to support prosecution. Niles had to go to a great deal of trouble to secure her final paycheck from Big Sky. She sued for defamation, negligent infliction of emotional stress, wrongful termination, and breach of the covenant of good faith and fair dealing.

At trial, several former Big Sky employees testified that Niles was a good and respected employee. Testimony also indicated that Big Sky was shoddy and haphazard in handling money and keeping books. The employee who supposedly had fingered Niles emphatically denied that she had ever reported her to L. Vainio. Niles presented evidence of emotional and economic suffering resulting from the ordeal. The jury returned a verdict in her favor and awarded $470,000. Following the verdict, both sides appealed on several issues. We will discuss only a few.

The defamation claim in Niles's suit was based on Big Sky's report to the police. Big Sky asserted that the claim should not have been allowed, as a qualified privilege exists for a statement made by an employer about an employee for the protection of a lawful business. The Supreme Court pointed out that "the qualified privilege is waived if it is abused." Substantial evidence on the record indicated that L. Vainio had made his statements "without good faith," thus negating the qualified privilege.

Big Sky also claimed that Niles's claim of wrongful termination didn't hold water: she had not been fired. The Supreme Court said that "a doctrine of constructive discharge has been recognized in Montana." Based on that doctrine, the Court said, "No speculation is required for the jury to conclude that when an employer causes the arrest of his employee ... that the employee has been constructively fired. It defies human experience to believe that Niles would reappear for work the next workday following her arrest."

Another issue on appeal was "comparable employment." It referred to Big Sky's offer to re-employ Niles; district court excluded that offer from evidence. Rather than standing as evidence that would aid in Big Sky's defense, the offer was part of "compromise negotiations" — an attempt by Big Sky to stave off litigation. The fact that the offer was made after Big Sky had already received a draft of the complaint — although before the suit was filed — led to that conclusion by the Court.

Finally, Big Sky appealed Niles's claim of negligent infliction of emotional distress. The Supreme Court said, "Where there is evidence of substantial invasion of a legally protected interest which causes a significant impact upon the person of the plaintiff, emotional distress is compensable without showing of physical or mental injury." In summary, the Court upheld the trial verdict on all issues.

Hobbs v. Pacific Hide and Fur Depot (1989) 236 Mont. 503, 771 P.2d 125

This is another case the Supreme Court sent back for retrial after finding errors in the original trial. Here, the errors centered once again on the nature of the implied covenant of good faith and fair dealing.

In the fall of 1978, Roger Palmer interviewed Clifford Hobbs for a job with Pacific Hide and Fur. According to Hobbs, Palmer painted a glowing picture, saying Hobbs would have a bright future and job security with Pacific. These statements, along with other promises, induced Hobbs to move from Denver to Great Falls to become Pacific's director of corporate purchasing in December, 1978.

Unfortunately, Palmer and Hobbs did not get along well. Still, Hobbs was promoted in August, 1980, overseeing a branch of Pacific while still running purchasing. Apparently, though, his pay was less than that of other branch managers. And while other managers reported to the president or vice president of Pacific, Hobbs had to report to Palmer, who continued to be disruptive. At one point, Palmer was disciplined and removed as Hobbs's supervisor, but became his supervisor again a few months later. Other managers reported having trouble with Palmer.

In April, 1981, the branch management duties were taken from Hobbs; he still directed purchasing, under Palmer's supervision. In September, 1981, Pacific fired Hobbs without prior notice. At that time, Pacific's president circulated a letter to other managers saying Hobbs had not worked out as branch manager but had done an excellent job in purchasing. The letter went on to say that the conflicts between Hobbs and Palmer "should now be resolved." Eight months later, Pacific fired Palmer, apparently because of unresolved conflicts with other managers.

Hobbs sued, claiming actual fraud, constructive fraud, breach of the implied covenant of good faith and fair dealing, and negligent misrepresentation. The case went to trial in 1984, and the jury found against Hobbs on all claims. He appealed on four issues, and the Supreme Court granted a reversal on one of the four issues and partially agreed with Hobbs on one other issue.

The reversal focused on the instructions the District Judge gave to the jury relating to the covenant of good faith and fair dealing. The Court said the instructions were "inadequate, confusing and misleading." The Court reviewed its past pronouncements on the covenant and studied the two instructions given by the district court. "Taken together, the court's instructions failed to tell the jury the nature and extent of the implied covenant of good faith and fair dealing." The Court then offered a suggested instruction regarding the covenant; the concluding paragraphs of these instructions would state:

> "In determing whether the defendant violated the duty of good faith and fair dealing, you must balance the interest of the defendant in controlling its work force with the interest of the plaintiff in job security. ...
>
> "Thus, if the employer is motivated to discharge the employee for reasons unfair or not honest, the employee is entitled to recover damages proximately caused by the breach. On the other hand, if the employer was motivated by honest business reasons in discharging the employee, the employer had the right to terminate the employment ..."

Another issue dealt with information exchanged during discovery. Since one of the reasons Pacific gave to Hobbs regarding his dismissal was difficult economic times, Hobbs had requested income tax records of the company from 1979 through 1982. The Court agreed these records could be used as evidence. At trial, Hobbs's financial expert had been cross-examined by Pacific regarding information that apparently had not been made available during discovery. The Court directed that "information that may be used by either party in direct or cross-examination of witnesses must be supplied in accordance with the request for production" during discovery.

Hobbs also contended that district court had improperly instructed the jury on constructive fraud. However, the Supreme Court said Hobbs's "theory or basis for constructive fraud [was] not properly conceived in this case." Hobbs had cited statements made by Palmer during the employment interview that Pacific was a "gold mine" and the job was the "opportunity of a lifetime." The Court said, "Such statements are not the source of [Hobbs's] problems ... nor are they demonstrably false. The statements may arguably have given rise to justifiable expectations in Hobbs about his employment, but they do not constitute a basis for constructive fraud."

Justice Weber dissented. He delved into the record to review "substantial evidence to support the conclusion of the jury" that Hobbs should have been terminated. He also said the instructions to the jury

on the covenant were "a fair statement of the law as it existed and was available to the trial judge and attorneys during the 1984 trial." Weber also noted that "almost 8 years have passed since the date of termination and 5 years since the trial. We are posing a difficult trial problem ... by the present reversal."

Gentry, Damon, and Gleich v. City of Helena and the Police Commission of the City of Helena (1989) 237 Mont. 353, 773 P.2d 309

This case did not involve any tort claims relating to discharge; rather, it was a continuing "judicial review" of an administrative decision. The three plaintiffs were Helena police officers who had been charged with misconduct. Under statute, they had a hearing before the Helena Police Commission. The Commission imposed 90-day suspensions on Gentry and Damon and a 30-day suspension on Gleich. The Helena city manager modified the Commission's decision and fired all three.

The officers petitioned in district court for judicial review of the actions. When district court upheld the decision, they appealed to the Supreme Court. The Court determined that all the proceedings had gone according to statute, including the city manager's decision to modify the Police Commission's disciplinary action. The Court then said that the principal issue on appeal was "whether substantial evidence supports the decision of the Police Commission as modified by the City Manager."

Under the law and previous decisions, the Court said, "[t]he findings of the Commission are final and conclusive and supported by substantial evidence." In addition, it is not up to the courts "to determine penalties, sanctions or disciplinary measures that may be taken against a police officer." The Court determined that "substantial evidence on the whole record does support the findings and conclusions of the Helena Police Commission, and the decision as modified by the City Manager."

With that out of the way, the Court addressed other issues raised by the plaintiffs. Most of the matters were technical in nature, and Court did not find reversible error in any aspect of how the case was handled or the hearing conducted. Final among the issues was the officers' contention that the discipline (discharge) was disproportionate to the misconduct. The Court simply said that such discipline was up to the Commission and city manager. "[T]hat kind of decision relating to the personnel of the city is beyond our reach and jurisdiction."

Peterson v. Great Falls School District No. 1 and A (1989) 237 Mont. 376, 773 P.2d 319

***(NOTE:** The 1991 Legislature amended § 2-9-111, MCA, to effectively remove the shield in wrongful discharge situations. A text of the amended law is appended to this summary.)*

With this decision, the Supreme Court reaffirmed and "expanded" its view of legislative immunity under § 2-9-111, MCA (see *Barnes* and *Bieber,* above). The Court upheld district court's summary judgement in favor of the school district because of legislative immunity.

Vicki Peterson worked as a custodian for the Great Falls school district. In May, 1984, she was fired. She alleged that the basis of her termination was her refusal to empty 55-gallon trash drums into a dumpster. According to Peterson, she had asked that her job duties be changed so she wouldn't have to empty the barrels. The District refused, telling her to get help in handling the containers. When she still refused to "manhandle" them, an administrative assistant fired her. Peterson contended in her complaint of wrongful discharge that requiring her to empty the barrels created an unsafe workplace and violated a Great Falls city ordinance banning the use of 55-gallon barrels for trash.

In her appeal, Peterson said the discharge was an administrative, rather than legislative, action and was thus not covered by the statutory immunity. The Court said, "While the title of the statute infers that the immunity granted is for legislative acts or omissions, the actual language employed in defining and granting the immunity is much broader." The Court agreed with district court that "the action of the legislative body need not be legislative in order to afford immunity."

"The statute," continued the Court, "clearly extends immunity coverage to school districts, to the school boards governing those school districts and to agents of those school boards." Although an administrative assistant fired Peterson, he brought the decision before the board at its next meeting, and the board ratified the decision. The immunity also applies to actions by "agents" of the legislative body. Here, the Court said, the administrative assistant was the agent, and the action was ratified by the board.

Peterson also contended that the immunity statute violated her fundamental right to full legal redress under the Montana Constitution. The Court disposed of this argument under the precedent

set in the *Bieber* case: "The statute has previously passed [the] rational relationship test and we find that Peterson's argument of unconstitutionality must fail."

Justice Sheehy dissented, saying the majority decision was "an incorrect reading of the statute." It was his opinion that "the intent of the legislature was to grant immunity for legislative action by a legislative body, and no more." In expanding his viewpoint, Sheehy said, "A body acts legislatively when it sets policy, or adopts regulations for the enforcement of its policies. Beyond that, the entity or its agents are acting administratively and should not come within the ambit of legislative immunity."

Sheehy also discussed the constitutional issue of access to the courts and full legal redress. He concluded, "It is enough to say here that in my view § 2-9-111, MCA, carried to the extent decided by the majority in this case, violates Article II, Section 16 in every particular." Justice Hunt also dissented, saying "*Bieber* does not grant ... immunity to a member of the government who is not also engaged in legislative functions."

Keller v. School District No. 5 and Ed Argenbright (1989) 237 Mont. 481, 774 P.2d 409

This case concerns judicial review of administrative proceedings, specifically regarding nonrenewal of a teacher's contract. It bears some relationship to the 1984 *Bridger Education Association* case (see p. 9).

In April, 1987, Rose Keller was informed that her teaching contract would not be renewed for the next school year. The letter she received gave no reasons for the termination, but the school board minutes indicated that all the nontenured teachers had been terminated for financial reasons. Keller relied on those minutes and did not request a specific statement of reasons, as allowed under statute (§ 20-4-206(3), MCA).

After the passage of a mill levy in June, 1987, the board voted to extend contracts to all the laid-off teachers, with the exception of Keller. In July, she appealed her termination to the County Superintendent of Schools. Her appeal was dismissed on the basis that it had not been filed within 30 days of the April notification on nonrenewal, as required by administrative rule. The State Superintendent of Public Instruction upheld this decision, but district court reversed it.

When the Supreme Court reviewed the case, it noted simply that Keller had not requested the reasons for termination within 10 days of notification, nor had she appealed the nonrenewal within 30 days of notification. Keller claimed special circumstances merited an exception to these limitations. First, because of the resolution of the school board that "financial conditions" necessitated laying off nontenured teachers, she did not file a specific request for reasons. Anyway, the board need not have provided a response to such a request, as § 20-4-205(4), MCA says that no reasons need be given "when the financial condition of the school district requires a reduction in the number of teachers ... and the reason for the termination is to reduce the number of teachers ..."

Secondly, Keller argued, she appealed the termination only after she was the sole teacher not rehired. The board's action indicated that its reasons had changed, and therefore, "financial conditions" was no longer applicable. The Court, however, stuck to the time limitations and reversed the district court decision. "Even in those cases where 'financial conditions' is the alleged reason for termination, nontenured teachers cannot assume this is the reason for termination unless they request ... written confirmation of the reasons for termination."

Justice Hunt dissented, implying that Keller was the victim of a Catch-22. She lost because she didn't ask for reasons on time, but had she asked, the board need not have provided any. She relied on the school board's resolution as reported in the minutes; Hunt wrote, "If a teacher cannot rely on a resolution of the school board, what can she rely on?"

Thompson v. Board of Trustees of School District No. 2, Yellowstone County (1989) 237 Mont. 498, 774 P.2d 412

In this case, the Supreme Court again undertook a review of administrative proceedings involving a teacher. The case follows a complex procedural path that began in March, 1983, when the school board voted not to renew Roger Thompson's contract as choir teacher at Billings West High School. The board notified Thompson by letter, which stated in part, "School District No. 2 would be better served by another teacher in this position."

Thompson responded with a letter requesting the specific reasons for termination and also requesting a hearing before the board. The board wrote back, saying its first letter "included the reasons

for the termination ..." but granting an "appeal." After the appeal, the board voted again to terminate Thompson's employment. It never provided any additional reasons, either in writing or orally.

Thompson appealed to the County Superintendent, who dismissed the appeal as not being properly presented in accordance with administrative rules. Thompson took no further appeal. At the same time, though, he was pursuing a grievance under the union contract. His grievance did not contest the sufficiency of reasons given by the board. The grievance was denied at the first two levels. His next choice was to go to arbitration, but the union no longer backed him at this point. Thompson did not proceed with his grievance; instead, he filed a tort claim in district court in June, 1983, alleging tort liability, violation of due process, and breach of the covenant of good faith and fair dealing.

In March, 1988, district court granted partial summary judgement to both sides. Although legally complicated, the order in essence said Thompson had no claims against the school district except that it had to provide him with specific reasons for nonrenewal of his contract. Thompson appealed to the Supreme Court.

The Supreme Court held that Thompson's "own Grievance Report contradicts the basic assertion in [his lawsuit] where he complains that the notice was insufficient." Further, the Court said, "[w]e conclude that the grievance procedure ... is the binding method of disposing of the issues ..." Finally, "[b]ecause Mr. Thompson chose not to proceed to binding arbitration, that terminated any further rights with regard to the claimed grievance." The Court's concluded "[B]y failing to follow these contract provisions, Mr. Thompson has lost his right to obtain specific reasons for nonrenewal."

With regard to Thompson's tort claims against the district, the Court simply said, "As he failed to follow the appropriate administrative procedure, he is barred from making the same contentions" in his lawsuit. Thus, the Supreme Court affirmed summary judgement in favor of the district, and reversed the district court's order that the school district had to provide specific reasons to Thompson.

Meech v. Hillhaven West, Inc., and Semingson (1989) *238 Mont. 21, 776 P.2d 488*

On June 29, 1989 — nearly two years after the Wrongful Discharge from Employment Act took effect — the Montana Supreme Court upheld the constitutionality of the Act in all respects. This landmark decision by a 4–3 majority overruled three previous decisions in which the Court had developed its interpretation that Article II, § 16, of the Montana Constitution guarantees a fundamental right to full legal redress.

The case came to the Supreme Court from Federal District Court in Great Falls. Russell Meech had filed an action in that court, seeking damages for wrongful termination, breach of the implied covenant of good faith and fair dealing, and intentional or negligent infliction of emotional distress. Hillhaven moved for a dismissal, saying that the Wrongful Discharge Act precluded Meech's claims. Meech responded by contending that the Act violated Article II, § 16, of the Montana Constitution. The federal court then certified two questions to the Montana Supreme Court:

> 1) Is the Montana Wrongful Discharge from Employment Act unconstitutional in that it serves to wrongfully deprive an individual for his or her right to "full legal redress" within the meaning of Article II, § 16?
>
> 2) Are those provisions of the Montana Wrongful Discharge from Employment Act which expressly prohibit recovery of noneconomic damages, and limit the recovery of punitive damages, violative of an individual's right to "full legal redress" within the meaning of Article II, § 16?

The Court responded, "We answer 'No' to both questions." The majority then undertook a lengthy opinion to explain its answer.

In explaining its "no" to the first question, the Court stated, **"The Act does not violate the fundamental right of full legal redress, because no such 'fundamental right' is created by Article II, § 16."** This holding reverses the interpretation the Court had established in cases from 1981, 1983, and 1986. In so doing, the majority examined "long-standing, fundamental principles of constitutional interpretation" and held that its reasoning in the previous cases had been "flawed." The Court also held that "no one has a vested interest in any rule of common law. Therefore, as a general rule, the legislature ... may alter common-law causes of actions."

Under this reasoning, while common law causes of action were previously available for discharged employees, the legislature has "the authority to expand or reduce claims and remedies at common

law." In adopting the Wrongful Discharge from Employment Act, the legislature exercised this authority.

In answering the second question above, the Court said, **"The Act survives equal protection scrutiny because it is rationally related to a legitimate state interest."** This interpretation went beyond the scope of the question as certified and included "an analysis of the equal protection guarantee found in Article II, § 4, of the Montana Constitution." The Court thus reframed the question:

> "Do the limitations on the recovery of certain damages in the Act violate equal protection because the Act unconstitutionally burdens a class of claimants seeking damages for wrongful discharge?"

In order to discuss this question, the Court had to decide the "proper equal protection test" it should apply to the Act. Since it had already determined that no fundamental right of full legal redress exists, the Court said, "We determine that the proper level of scrutiny ... is provided by the rational basis test." (Note: The Court used the same test in upholding legislative immunity in the *Bieber* and *Peterson* cases above.) Using this test, the Court said, "We ... find that the Act's provisions on damages pass equal protection muster because the Act's disparate treatment of similar claims is rationally related to a legitimate state interest."

The Court agreed that unequal treatment of discharged employees could be a result of the Act, but a "legitimate state interest" could rationally justify that result. The Court interpreted the intent of the legislature in passing the Act to be "promoting the financial interests of businesses" in Montana. It was also the Court's opinion, based on precedent, that "to improve economic conditions in Montana constitutes a legitimate state goal." Further, the Court said, "[w]e also conclude that the Act relates rationally to promoting Montana's economic interests."

The Court broadly traced the development of the law regarding discharge:

> "Until recently, the fundamental body of law governing available damages in the employment area has been contract law. Courts ... have expanded employers' liability by recognizing tort claims in the employment context. The legislature has now acted to reverse this trend by restricting damages for wrongful discharge."

The Court related this development (from contract law to tort claims back to contract law) to the legitimate state interest of limiting employers' liability in discharge cases:

> "The Act's limitation on damages applies long-standing contract law in an attempt to solve this problem [of employer liability] by dictating a more objective measure of damages. Under the Act, employers benefit because their potential liability is made more certain. Meanwhile, employees' control over the manner in which they are discharged remains, in part, as a result of the Act's 'good cause' requirement. The Act, in making this trade, is in no sense irrational."

The Supreme Court was closely divided in this decision. Justice Sheehy wrote a stinging dissent, in which Justice Hunt concurred. Sheehy's dissent, which labeled the majority decision as possibly "the blackest judicial day in the history of the state," disputed the majority opinion point by point. His conclusion ...

> "If Art. II, § 16 of the Montana Constitution does anything, it imposes upon the judiciary the duty to guard the state constitution. In its decision today, this Court sidesteps that duty and reverses not only the cases mentioned in the majority opinion but a long line of cases in the past 15 years that have established solid boundaries for employers and employees ... In yielding our duty to the vagaries of the legislature, we have disadvantaged a large portion of the Montana labor market in the guise of a better business climate. The Wrongful Discharge from Employment Act of 1987 is economically and socially regressive. The majority opinion is legally regressive. Because of the unwillingness of the majority to act properly in a constitutional case, regressiveness is the order of the day.
>
> "I would hold the Wrongful Discharge from Employment Act of 1987 to be invalid on the basis that under an equal protection test it cannot meet even a rational scrutiny. The only basis for the Act that I can find is that as between business and the workers, the legislature discriminatingly prefers business. That is not a constitutional basis on which to found a statute."

Justice Harrison dissented on narrower grounds. He objected to "reversing so many cases this Court has previously decided." In particular, he would uphold the previous case that held "when a cause of action is grounded on statute the plaintiff has a fundamental right to full legal redress under that statute."

Although this case was argued in conjunction with *Johnson v. State of Montana & Ed Argenbright,* the opinion did not address the Johnson case. However, that action presented an identical challenge to the Wrongful Discharge from Employment Act, and the Court disposed of it in the decision immediately following.

The full text of the Wrongful Discharge from Employment Act appears in the appendix.

Johnson v. State of Montana and Ed Argenbright (1989) 238 Mont. 215, 776 P.2d 1221

This case came before the Supreme Court at the same time as the *Meech* case (above). The issues were nearly identical, and the Court disposed of the case in a brief opinion.

Judy Johnson held a high-level job as deputy superintendent with the Office of Public Instruction. In July of 1987, just a few days after the Wrongful Discharge from Employment Act took effect, Ed Argenbright, the elected Superintendent of Public Instruction, dismissed Johnson from her position. She filed separate actions: a complaint with the Department of Administration on the merits of the discharge, and a lawsuit challenging specific sections of the Act. This decision concerns the latter.

District court granted summary judgement to Johnson, declaring § 39-2-904 (remedies) and § 39-2-913 (preemption of common-law remedies) unconstitutional. The Supreme Court tersely stated, "*Meech* controls this case. Therefore, the decision of the District Court must be reversed."

"Other issues have been briefed on appeal ...," the Court continued. "These issues have not been ruled on by the District Court. Therefore, they are presented prematurely before this Court, and cannot be properly reviewed at this time." The Court remanded the case for further proceedings to fall under the stipulations of the Wrongful Discharge Act. The parties eventually settled out of court.

Coombs v. Gamer Shoe Company (1989) 239 Mont. 20, 778 P.2d 885

This lawsuit concerns the closing of the Carlson's Shoe Store in Great Falls, which resulted in the termination of all store employees. David Coombs had started working at Carlson's in 1977. In August, 1986, the store manager told him that the store would likely close within a year; he also told Coombs that Gamer would try to find him a position, but made no guarantees. In April, 1987, Gamer announced that the store would close by the end of the summer. They offered to keep Coombs on part-time until the actual closure, but he declined. When the store closed, all the employees lost their jobs.

Coombs filed suit, contending that his termination breached the implied covenant of good faith and fair dealing. (His termination in April, 1987, preceded the effective date of the Wrongful Discharge Act.) Gamer management said Coombs was a loyal and satisfactory employee; Coombs said the company should have found a position for him, even though it had not guaranteed him a job. District court granted summary judgement in Gamer's favor, and Coombs appealed.

Coombs contended two issues of fact precluded summary judgement: 1) Gamer's reason for eliminating his job may have been a pretext, and 2) because the company led him to believe it would find a job for him, it may have breached the covenant of good faith and fair dealing. The Supreme Court affirmed summary judgement, saying "In short, the record establishes that Gamers discharged Coombs for legitimate economic reasons." The Court concluded that "[n]o evidence of pretext exists in the record." Coombs had testified that Gamer made no promises or guarantees about continued employment; "[t]herefore, Gamers did not violate the covenant of good faith and fair dealing ..."

Karell v. American Cancer Society, Montana Division, Inc. (1989) 239 Mont. 168, 779 P.2d 506

This case also concerns the covenant of good faith and fair dealing, as the discharge took place before the Wrongful Discharge Act took effect. It is interesting, though, for the Supreme Court clarified the implied covenant with regard to expectations of job security and warnings of termination. Carol Karell began working as Division Program Director for the Montana American Cancer Society (ACS) in Billings in January, 1986. During her year-long employment, she received three memos from officers of the national organization praising her work. She also received three critical letters from her immediate boss, Stan Weiczorek, the Montana ACS vice-president. Weiczorek fired Karell in January, 1987.

In April, 1987, Karell filed suit, alleging breach of the implied covenant of good faith and fair dealing and negligent discharge. District court granted ACS's motion for summary judgement, and Karell appealed. She disputed the district court's finding that the implied covenant did not exist in her employment with ACS. She also contested the court's finding that ACS had not negligently discharged her. ACS cross-appealed, contesting the court's rejection of its memorandum of costs as not timely filed.

On appeal, ACS argued that "no attending facts show that [ACS] gave Karell any reason to believe that her position was secure and, therefore, the implied covenant against bad faith never materialized." The Supreme Court agreed. The Court noted that Wieczorek had criticized Karell's job performance on several occasions and had taken several remedial steps to improve her performance. "From these facts," the Court concluded, "it is difficult to see how any reasonable person could believe that their job was secure."

Karell argued that the laudatory remarks in the three memos from the national ACS constituted objective manifestations of job security. The Court disagreed: "Objective manifestations of job security must come from the employer." Noting that Karell worked for the Montana ACS chapter, not the national organization, the Court continued, "The employer has the exclusive right to hire and fire. The employer ... is the only one with the power to create job security." Therefore, "non-employer comments do not support an implied covenant of good faith and fair dealing."

Karell also cited a conversation between her and Wieczorek during a ski trip they took about a month before she was fired. She said her told her she "'had a wonderful future with the American Cancer Society and ... could go anywhere.'" The Court discounted this comment, saying "evidence must be substantial and material. Occasional compliments by an employer are not sufficient to establish a reasonable expectation of job security." Finally, Karell said Wiedzorek never warned her that her job was in jeopardy. The Court stated, "Such warnings are not mandatory, but may be considered along with other evidence of objective manifestions of job security."

In short, the Court concluded, "[Karell's] evidence is distilled to one compliment from her employer and the fact that he did not threaten to fire her before doing so." This was not enough to establish the implied covenant of good faith and fair dealing. On the issue of negligent discharge, the Court noted that Karell presented no arguments on appeal, nor did she move for dismissal of the issue. Therefore, the Court affirmed summary judgement on the negligent discharge issue.

ACS's cross-appeal on the timely filing of its memorandum of costs represented a technical issue of dates and deadlines. The Supreme Court held that district court had erred in its calculations and so reversed the lower court's dismissal of the memorandum.

P.W. Berry Company, Inc. v. Freese (1989) 239 Mont. 183, 779 P.2d 521

This appeal comes from a sex discrimination complaint filed with the Human Rights Commission that proceeded through district court to the Supreme Court. At issue was the amount of back wages awarded by the commission.

Debra Freese worked briefly for Berry at construction on two occasions. In April, 1984, she worked for three days as a pipe layer before Berry fired her. In August, 1984, she worked another three days as a general laborer, including work as a pipe-layer; Berry fired her again. The Human Rights Commission concluded that Freese met the qualifications for both jobs, and both terminations constituted illegal discrimination on the basis of sex. It awarded $11,755.12 back wages, offset by $7,024.87 in Freese's earnings at other jobs; the net award was $4,730.25.

Berry's appeal contended that the commission should not have allowed testimony and an exhibit from a certain witness, since Freese had not listed the witness on her pre-hearing order. Berry also contended that the back wages were improperly calculated, for the construction job had not provided 27 days of pipe-laying work, but Freese had been awarded 27 days' worth of wages.

The Court disposed of the first argument by noting that Berry had listed the same witness on the pre-trial order, but had decided not to call her. "Berry could not have been surprised by the testimony of a person whom the employer had listed as one of its own witnesses." Therefore, the testimony and exhibit were proper. On the second argument, the Court noted that Berry had hired Freese the second time as a general laborer, not a pipe-layer. "The Commission therefore calculated the amount of days of availability for both types of labor [pipe-laying and general] and based its award of back pay on that number of days."

Berry contended that the commission had placed an improper burden of proof on the company to show that it could not have employed Freese for that number of days. However, under proper interpretation of federal case law, the Court noted, "once a charging party has established a prima facie case of discrimination and established ... the damages ..., the burden then shifts to the defendant to prove ... that a lesser amount is proper." Freese had established her case, so the Commission properly placed the burden on Berry to prove that the award was improper. The Court found that Berry failed to do so.

Gibson v. James Graff Communications, Inc. et al. (1989) 239 Mont. 335, 780 P.2d 1131

This is a complex contract case with a simple decision by the Supreme Court. At issue was whether the plaintiffs could be compelled to submit their contract dispute to arbitration. The plaintiffs were William Gibson, Jr., Inc. and William Gibson Jr., as an individual. The parties to the lawsuit had entered into contractual agreements in November, 1980, establishing employment and partnership among Gibson, James Graff, and Sage Advertising of Billings. All three contracts contained similar arbitration clauses.

Graff and Sage terminated Gibson's employment in August, 1984. For a few years, the parties tried to negotiate a settlement to Gibson's claim of wrongful termination. Early in 1987, a letter from the defendants to Gibson suggested settling the issue through binding arbitration. However, Gibson filed suit in August, 1987. The defendants raised a defense of mandatory arbitration that would preclude litigation. The district court agreed and granted summary judgement. Gibson appealed.

The Supreme Court noted, "The law is clear that if a contract falls within the ambit of the Federal Arbitration Act [FAA], then an arbitration clause found in that contract must be enforced." The contract would fall under the FAA if it involved a business engaged in interstate commerce. Sage Advertising conducted 95% of its business in Montana, but the remaining 5% involved Wyoming, North Dakota, and South Dakota. Gibson argued that 5% was too little to constitute interstate commerce. The Supreme Court disagreed, saying "the District Court correctly found that the FAA applied to the partnership and employment agreements and required enforcement of the arbitration clauses."

State, ex rel., First Bank System, First Bank West Great Falls, and Reichel v. District Court, Eighth Judicial District, and Pancich (1989) 240 Mont. 77, 782 P.2d 1260

This case remains factually incomplete and legally complex as of this writing. It involves the discharge of Robert Pancich as president of First Bank West Great Falls. In 1983, an adverse federal report on the bank prompted John Reichel, regional director for the First Bank system, to fire Pancich on August 12, 1983. Prior to taking the action, Reichel contact four members of the bank's board of directors, recommending the discharge. On August 18, the board elected a new president. On September 15, the board accepted Pancich's resignation.

Pancich filed suit, alleging wrongful termination and breach of the implied covenant of good faith and fair dealing. Affidavits filed by the board members provided this tally: four discussed the termination with Reichel before it took place; three others had formed the opinion that Pancich should go; all nine voted August 18 to concur in Reichel's termination of Pancich's employment.

The bank moved for summary judgement; it was denied. The bank then asked the Supreme Court to take supervisory control over the case; it was denied. A year later, Pancich moved for summary judgement; district court granted summary judgement on the issue of the bank's liability and set a trial date for determining damages. The bank appealed the summary judgement and again asked the Supreme Court to take supervisory control.

The Supreme Court took control. First, it vacated the summary judgement, saying the district court had misapplied the law regarding summary judgement: "summary judgement is not a decision on the merits. A denial of summary judgement is simply a decision that there are factual issues." When the district court had denied the *bank's* motion for summary judgement, it had concluded that there were factual disputes. "If there were factual disputes," the Supreme Court said, "neither plaintiff nor defendant were entitled to summary judgement." Looking at the record, the Court concluded that several factual issues remained in the case.

The other issue the Court considered was whether supervisory control was appropriate. "This Court may accept supervisory control," it pointed out, "when due appeal is an inadequate remedy." It may also be used "in the nature of a summary appeal — a shortcut — to control the course of litigation in the trial court ... to prevent extended and needless litigation." Given this possible course of action and the nature of this case, the Court concluded that "the order of the District Court was manifestly incorrect and created problems sufficiently burdensome to the defendants [bank and Reichel] to

require this Court to take supervisory control." With that control, the Court vacated summary judgement and sent the case back for further proceedings.

Three of the seven justices dissented. Justice McDonough "would deny the writ [of supervisory control]." He said the bank would have an adequate remedy through a normal appeal of the eventual outcome in district court.

Justice Sheehy dissented at length on both issues. Primarily, he pointed out, the federal National Banking Act confers "at-will" status on an officer, such as Pancich was as president. However, the same law stipulates that only the bank's board of directors can fire an officer. "Any other kind of dismissal is against the law and gives rise to liability." When Reichel fired Pancich, said Sheehy, he "acted completely against a Congressional statute." All other issues then became moot. Sheehy would have upheld the summary judgement. Even if that were not the case, he continued, he would not have taken supervisory control, because "there is a complete, adequate, and speedy remedy by appeal." Justice Hunt concurred with Justice Sheehy.

Mitchell v. University of Montana, Bucklew, and Cotton (1989) 240 Mont. 261, 783 P.2d 1337

This appeal focused on the legislative immunity granted under § 2-9-111, MCA (see the *Barnes, Bieber,* and *Peterson* cases above). However, that issue came into play only after a complicated series of events. ***(NOTE:*** *The 1991 Legislature amended § 2-9-111, MCA, to effectively remove the shield in wrongful discharge situations. A text of the amended law is appended to this summary.)*

Sandy Mitchell is a certified public accountant who started working in the U of M controller's office in 1978. In October, 1981, the controller, Kay Cotton, fired Mitchell. She alleged that the termination was unfair, a result of a long-standing feud between her and Cotton, exacerbated by their competition for the controller job. She appealed the termination through the University Grievance Committee, which found in her favor and recommended that she be reinstated.

Cotton reinstated Mitchell, placing her in a new and, according to Mitchell, more difficult job. In February, 1983, Mitchell was again fired. This time, the grievance committee upheld the discharge. After exhausting her administrative remedies, Mitchell filed suit in March, 1984, alleging a breach of the covenant of good faith and fair dealing.

The University moved for summary judgement, asserting 1) the defendants were immune from suit, 2) Montana law does not permit judicial review of the personnel decisions of the Board of Regents, and 3) the facts show they did not breach the implied covenant. In April, 1989, the trial court denied summary judgement. In May, 1989, the Supreme Court rendered the *Peterson* decision on the issue of legislative immunity. The defendants in this case then renewed their motion under the disposition of the *Peterson* case. This time, district court granted the motion. Mitchell appealed.

The defendants argued that the Board of Regents, which controls U of M, is the legislative body of the University System, and that Neal Bucklew (U of M president) and Cotton are officers and agents of that legislative body. The Supreme Court disagreed: "The Board of Regents is not a '<u>local</u> governmental entity given legislative powers by statute' and thus not a 'legislative body' ..." The statute protects only the Montana Legislature, local governmental entities, and school boards. "The Board of Regents is not a local governmental entity, thus no immunity is afforded by the statute in this case." With this decision, the case went back to district court for further proceedings.

Joyner v. Onstad and Gallatin County (1989) 240 Mont. 362, 783 P.2d 1383

In November, 1984, Gallatin County hired Jack Joyner as a jailer. In May, 1985, he broke regulations by entering alone a female prisoner's cell. Sheriff Onstad suspended him pending investigation. After completing the investigation, Onstad fired Joyner.

Joyner appealed to the Department of Labor and Industry. Following a hearing, the department sustained the discharge. The Gallatin County County Commission voted to uphold the discharge. Joyner then filed suit, alleging wrongful discharge and breach of the implied covenant of good faith and fair dealing.

The county and the sheriff moved for summary judgement. When the motion came to a hearing, Joyner, representing himself, asked for another week to file a reply brief. Still, he didn't get it in on time. In fact, he never filed a response. District court granted summary judgement to the defendants on the grounds that Joyner failed to oppose the motion. Joyner appealed.

The Supreme Court outlined the civil procedure rules for summary judgement. It emphasized that the party opposing the motion must specifically respond as to why summary judgement is inappropriate. "If he does not so respond," the rule states, "summary judgement, if appropriate, shall be entered against him." "Joyner," said the Court, "did not deny nor rebut the defendants' arguments. Joyner also did not set forth any facts showing that a genuine issue existed for trial." Joyner's day in court was short; summary judgement was upheld.

Buettner v. State of Montana, Dept. of Labor & Industry (1989) 240 Mont. 389, 784 P.2d 906

Duane Buettner's appeal concerned the dismissal of his lawsuit against the department. At issue was a sequence of actions by date:

1) on December 31, 1984, the department terminated Buettner's employment.
2) the 1987 Legislature passed a law requiring any claims against the state to be submitted to the Department of Administration before a lawsuit may be filed. The law took effect October 1, 1987.
3) on November 11, 1987, Buettner filed a tort action against the state, without first presenting his claim to the Department of Administration, as required by the new law.

Relying on the new law, district court dismissed Buettner's tort action. He appealed, saying that his cause of action (termination) took place in 1984, long before the law took effect. Therefore, he argued, the law could not constitutionally apply to his situation. Then, when district court dismissed his lawsuit, the statute of limitations on his tort action (three years) had expired, so even if he wanted to file a claim with the Department of Administration, he couldn't.

The Supreme Court agreed with district court that the requirements of the new law were procedural. "The Legislature can impose procedural requirements on a plaintiff before [he] can file a complaint in court as long as the procedures do not impair any of [his] substantive rights." The Court said it might be unfortunate that the statute of limitations had expired when Buettner found this out, "but it is not fundamentally unfair."

The Court provided some legal advice to Buettner, who was acting as his own attorney, about how he could file a new action. But in the present case, it said, "[Buettner] failed to comply with the law. District Court properly dismissed the complaint."

Finstad v. Montana Power Company (1990) 241 Mont. 10, 785 P.2d 1372

Ken Finstad worked 22.5 years for Montana Power, the last 15 as field engineer stationed at Cut Bank. His employment ended in June, 1982, after discussion of a transfer to Butte. Finstad's managers wanted him to accept the transfer; Finstad did not want to move. Finstad said MPC fired him; MPC said Finstad quit.

Finstad's lawsuit against MPC resulted in a jury verdict in his favor, with an award of $433,500 in damages. MPC asked the district court for a judgement notwithstanding the verdict and a new trial. The motion was denied, and MPC appealed. The Supreme Court considered two issues: 1) whether sufficient "substantial, credible" evidence existed to support the jury verdict, and 2) whether the implied covenant of good faith and fair dealing should apply to a termination following a refusal to accept a lateral transfer.

In examining the first issue, the Court cited precedent: "In the absence of probative facts to support the jury's verdict, it can be overturned." The Court then undertook an extensive review of testimony and reached "a key factual conclusion: it was Mr. Finstad who made the decision to terminate his employment with MPC. All MPC did was honor his decision." The Court said Finstad's refusal to accept a transfer to Butte, in effect, served notice of his resignation: "... the record does not contain facts establishing an express discharge or actual discharge." In examining whether MPC "rendered the working conditions for Mr. Finstad so oppressive that resignation was his only alternative," the Court concluded that no evidence demonstrated a constructive discharge, either.

Turning to the second issue, the implied covenant of good faith and fair dealing, the Court relied on its recent decision in *Frigon v. Morrison-Maierle* (see p. 27). In that case, the Court said the covenant would apply only in situations where an actual or constructive discharge occurred. In Finstad's case, the Court concluded "that a termination following the refusal to accept a lateral transfer does *not* constitute an actual discharge for purposes of invoking the covenant of good faith and fair dealing."

The Court overturned the jury verdict and directed entry of judgement for MPC.

Justice Sheehy, with Justice Hunt's concurrence, dissented at length. "Nothing is more clearly established in Montana law," he began, "that when a trial is by jury, all questions of fact are to be decided by the jury." "In reversing this hard-earned verdict," said Sheehy, "no error can be found by the majority" that would justify reversal. "Rather, the majority assume seats in the now vacated jury box and proceed to reverse the earlier jury on the facts."

"Whether Mr. Finstad quit or was terminated was a matter of hot dispute during the trial. The jury chose to believe Mr. Finstad," said Sheehy. He reviewed portions of testimony centering on that dispute. His conclusion was that "the majority apparently contend that the jury had no substantial basis upon which to render its verdict. The record is clear that there was indeed substantial evidence supporting the jury verdict and it should be maintained."

Vuykasin v. D.A. Davidson and Co. and Asserud (1990) 241 Mont. 126, 785 P.2d 713

In this case, the controlling issue was the enforceability of an arbitration clause between employer and employee.

Frances Vuykasin began working for D.A. Davidson in 1979. In 1985, DAD started doing annual performance reviews, and Vuykasin received reviews in 1985, 1986, and 1987. The latter two years, she also receive a bonus the same month as her performance review. It was also those two years that DAD placed an arbitration clause in performance reviews.

The statement was located directly above the line where an employee would sign his or her review. In part, the statement asserted that employment with DAD was at-will. Further, it stated, "I [the employee] also acknowledge and agree that any controversy arising out of my employment or the termination of my employment with the Company for any reason whatsoever shall be determined by arbitration ..."

Well, a controversy arose. In April, 1988, Vuykasin accompanied her son, a former DAD employee, to a Saturday meeting with Oswald Aaserud, a current DAD employee. Vuykasin alleged that Aaserud assaulted her, and as a result, she soon quit working for DAD. She filed a lawsuit against DAD and Aaserud, charging assault and battery by Aaserud and negligent hiring of Aaserud by DAD. She sought damages in several areas.

In court, DAD moved to dismiss the suit or, alternately, to have the court compel Vuykasin to submit her complaint to arbitration. The argument boiled down to this: Vuykasin contended she did not knowingly agree to arbitrate and there was no consideration for her agreement. DAD contended the performance reviews constituted a valid agreement, and the bonuses given Vuykasin were in consideration for signing them. (Vuykasin and two other employees stated they were never told the bonuses were given in return for signing.)

The district court had determined that the arbitration clause was "not part of a document purporting to be an employment contract ..." It said the agreement was invalid in it making because the agreement was not barganed for and Vuykasin did not knowingly enter into it. District court denied the motion, and DAD appealed.

The Supreme Court reversed. First, it said the arbitration clause was valid: "The performance review spells out a binding performance rating and a recommended salary increase. It contains Ms. Vuykasin's acknowledgement that she has reviewed these items, and her acknowledgement that either she or her employer may terminate employment at any time for whatever reasons. This document is clearly a binding agreement with regard to employment ... The arbitration clause is only a part of the agreement ..."

The Court then turned to the issue of the arbitration clause's enforceability. It may be true, it said, that the overall agreement is invalid, for reasons given by Vuykasin. However, that would be an issue for an arbitrator to decide. Citing its own precedent and that of the U.S. Supreme Court, the Court noted that the questionable validity of a specific arbitration clause could be litigated, but "if the issue is the validity of the entire agreement, this must be submitted to the arbitrators." Here, the arbitration clause is not severable from the entire agreement, so it must be enforced: "Since the District Court has no jurisdiction to determine the validity of the entire agreement, any such issues must be submitted to arbitrators."

Vuykasin argued further that "assault is outside the scope of the arbitration clause," because it is not

a normal employment dispute. However, the Court said the clause applied, in its own words, to "any controversy ... arising out of employment." Since the incident here occurred on DAD premises, involved DAD employees, and resulted in Vuykasin's termination, it "is clearly subject to the arbitration agreement." The Supreme Court directed district court to stay Vuykasin's lawsuit, pending the results of arbitration.

Niles v. Carl Weissman and Sons, Inc. (1990) 241 Mont. 230, 786 P.2d 662

In this case, the Supreme Court determined that a final decision from an administrative agency regarding unemployment benefits is not *res judicata* as to a separate action for wrongful discharge and breach of the implied covenant of good faith and fair dealing. In so ruling, the Court followed *Fetherston v. Asarco (I)* (see p. 14) and clarified *Nasi v. Department of Highways* (see p. 25).

Frank Niles drove truck for Weissman out of Bozeman. In May, 1987, he was supposed to haul a flatbed trailer from Livingston to Bozeman. Niles thought the trailer, loaded with a locomotive motor, was damaged and unsafe. He refused to haul it. Niles contended his supervisor told him to haul it or be fired, a statement the supervisor denied. Niles returned to Bozeman without the trailer, apparently thinking he was out of a job.

Niles filed for unemployment benefits, which were denied on the basis he voluntarily left his job. He appealed the denial, and an appeals referee sustained it. He appealed to the Board of Labor Appeals, which granted the unemployment benefits. Weissman appealed that decision to district court, which sent it back to the BLA. The BLA reversed, denying the claim. Niles appealed to district court, but failed to brief his petition. District court upheld the BLA's decision.

In October, 1987, Niles filed a wrongful discharge suit against Weissman. Weissman asked for summary judgement on the basis of the unemployment benefits determination. Weissman contended that the process had determined Niles' voluntary termination, serving as *res judicata* for the tort action. District court agreed and granted summary judgement. Niles appealed.

The district court order recognized a catch-22 in the situation: "If [claimants] fully pursue their administrative remedy for unemployment benefits, they may forego the remedy in the courts; if they choose to go through the court system, they may be barred by failure to exhaust their administrative remedies." The Supreme Court agreed, "There is indeed a dilemma here ..." and noted an apparent inconsistency between the *Nasi* and *Fetherston* cases.

Res judicata is a legal doctrine of judical finality, barring relitigation of an issue already decided. The Court outlined the four criteria of *res judicata:* 1) the *parties* are the same; 2) the *issues* are the same; 3) the *subject matter* is the same, and 4) the *relationship* among the parties, the issues, and the subject matter is the same.

The Court undertook an analysis of the *Nasi* and *Fetherston* cases, and found some crucial differences. "The compelling difference between *Nasi* and *Fetherston* is that in *Nasi,* a specific statute granted the Board of Personnel Appeals jurisdiction to determine Highway Department personnel grievances ... The BPA, by statute, had full jurisdiction to determine all the issues relating to the termination of Nasi." In Niles' case, though, the Department of Labor is limited by statute to determining claims filed for benefits, so "the issue of Weissman's good faith, or possible lack thereof, was not and could not be determined by the Department of Labor ..." "The issues determined before the agency, and to be determined before the District Court are not the same."

Under this analysis, *res judicata* could not apply to Niles's lawsuit. The Supreme Court reversed summary judgement.

Birrer v. Wheatland County School District No. 15 and Keenan (1990) 241 Mont. 262, 786 P.2d 1161

This case involves the termination of a tenured teacher. The termination procedure violated the statute regarding teacher termination, but the Supreme Court let the decision stand, as it "did not offend the purposes of the termination procedure statute (§ 20-4-204, MCA)."

Michael Birrer taught music at Harlowton High School. In March, 1987, the superintendent recommended that his and another position be eliminated due to funding shortages. The school board agreed and notified Birrer of the action. About three weeks later, the board held a hearing for Birrer. He appeared, but offered no evidence contradicting the need for a reduction in force. The board reaffirmed its earlier decision.

Birrer appealed the decision through the County Superintendent of Schools, the State Superintendent of Public Instruction, and district court. He lost every step of the way. The Supreme Court also upheld his termination, even though the school board's decision "to terminate Birrer ... before notifying the teacher ... and giving [him] a hearing thereon, clearly violated" the law. The statute requires that the school board makes its decision *after* a hearing takes place. Here, the board decided to lay Birrer off *before* the hearing.

Birrer felt he should be reinstated. The school board said mere "technical irregularities" in the termination should not nullify it. The Court did not like the board's argument: "The 'technicality' here goes to the very heart" of the law. "It is obviously public policy ... to protect tenured teachers from unjust terminations ..." Nonetheless, said the Court, "we affirm the termination of Birrer because of the obvious rectitude of the trustees' decision."

The Court reasoned that Birrer "was not accused in any way of incompetence, immorality, unfitness, or violation of ... policy." The reason for his termination was not personal, but "the undeniable and overwhelming state of the school finances" that meant a reduction in force. So, "under the peculiar facts of this case ... the purposes of the procedural statute ... were not contravened here."

Harris v. Cascade County School Districts No. 6 & F and Keenan (1990) 241 Mont. 274, 786 P.2d 1164

This case closely resembles the *Birrer* case. Ray Harris taught physical education at Simms High School. His position was full-time, and he held tenure. The superintendent recommended, and the school board confirmed, these actions: that the full-time PE position be eliminated, that Harris' contract not be renewed, that a half-time PE position be created. The board then notified Harris of his termination. A hearing was held, and the board reaffirmed its decision to terminate Harris.

Harris appealed to the County Superintendent of Schools, who upheld the termination but concluded the board had to offer Harris the new half-time PE position. He appealed to the State Superintendent of Public Instruction, who also upheld the termination and required the district to offer Harris the half-time position. Next stop for Harris was district court, which affirmed the decision completely, concluding that the "teacher was accorded all of his rights under the statute." Harris appealed to the Supreme Court. The district cross-appealed on the issue of giving Harris the half-time position.

Once again, the Court determined that the school board "violated the statutory procedure for terminating tenured teachers." "Therefore," said the Court, "we must disagree with the District Court's conclusion that the teacher was 'accorded all of this rights under the statute.' The statutory procedure was not followed." The Court rejected the board's semantic arguments and "mere technicality" defense. Nonetheless, said the Court, "we affirm the termination because under these facts the errors committed here did not cause the teacher substantial prejudice." Harris "was not terminated for any personal reason," said the Court, such as incompetence or immorality. "Under the particular facts of this case, no substantial prejudice occurred and the purposes of the procedural statute ... were not contravened."

Turning to the district's cross-appeal, the Court upheld the administrative decisions to require Harris be offered the half-time teaching position. In rejected the board's argument that it had first terminated Harris, thereby removing his tenure, then created the half-time position. The Court called this "a hyptertechnical distinction that could seriously threaten the value of tenure." The Court agreed with the Superintendent of Public Instruction that the board had, in effect, reduced the existing full-time position to a half-time one, and the board had to offer Harris a contract for it.

McCracken and Waggoner v. City of Chinook (1990) 242 Mont. 21, 788 P.2d 892

John McCracken and James Waggoner worked as police officers in Chinook. Waggoner had started in January, 1982; McCracken had started in October, 1983. The tenure of both officers was marked by controversy, including allegations of assault, disorderly conduct, and trespass. As a result, their relationship with the City was strained, and the mayor was seeking their resignations.

The officers contended that on July 30, 1984, they were summoned to the mayor's office. McCracken was told he would be laid off due to a reorganization; Waggoner submitted a letter of "forced" resignation. Waggoner's letter was never accepted by the City, and McCracken's lay-off was to take effect at a later date.

Shortly after midnight on July 31, 1984, the officers notified the dispatcher that they were "permanently 10-10, 10-42." The first is code for off-shift, the second is code for at home. They never returned to work. The City interpreted this action as a voluntary resignation. However, in February, 1986, the two men filed suit against the City, alleging wrongful discharge, constructive discharge, breach of contract, and breach of the covenant of good faith and fair dealing. District court

granted summary judgement to the City and assessed a sanction of $1200 against the plaintiffs for "lousy pleading." The former policemen appealed.

The Supreme Court agreed with district court. In order for the men to have a cause of action for wrongful discharge, they would have to show that they had, in fact, been fired. Under Montana law, police officers cannot be fired without a hearing before their police commission. Since this did not take place for McCracken and Waggoner, they could not bring a cause of action for wrongful discharge. Further, said the Court, "Montana has not yet recognized that an action from wrongful discharge can be successfully asserted when an employee voluntarily terminates the employment relationship." [This case arose prior to enactment of the Wrongful Discharge from Employment Act with its definition of "constructive discharge."] "Therefore," said the Court, "because the record indicates that the [officers] voluntarily quit the police force, their cause of action is barred."

The Court also upheld the "lousy pleading" sanction. It noted that the punishment was for "incomprehensible pleadings" and "inept legal work [that] cost the City of Chinook thousands of dollars in unnecessary legal costs."

Smith v. Roosevelt County and Grainger (1990) 242 Mont. 27, 788 P.2d 895

Mark Smith worked as deputy sheriff in Roosevelt County from October, 1985, until July 1988. He was fired for assaulting a prisoner without provocation. The sheriff cited Smith's actions as a violation of department policies and state law. In addition, he was tried in Federal District Court for mistreatment of a prisoner, since the prisoner in this case was a Native American. The jury, however, acquitted Smith.

Under Montana law regarding sheriff's deptuties, Smith had filed a petition for a district court hearing regarding his termination. After his acquittal, he moved for summary judgement in his favor. District court denied the hearing and held a jury trial; in March, 1989, the jury upheld his termination. Smith appealed.

Smith first contended that summary judgement had been improperly denied. He maintained that the his termination had been grounded on a felony conviction. Once he was acquitted, he argued, the termination grounds were invalid. The Supreme Court pointed out that Smith held "a basic misunderstanding of the termination statute." It was not necessary for a conviction to take place to justify a discharge. Since several questions surrounded the incident that led to his termination, the case properly went to trial.

Smith had moved in trial to withhold from evidence several paragraphs from his termination letter that referred to "other wrongdoings" during his tenure. He contended the information was irrelevant and prejudicial. The Court noted "that it was Smith who introduced the letter in its entirety to the jury. ... He cannot now claim that he was denied a fair trial by the admission of evidence that he himself introduced." With regard to witness testimony on the other instances of misconduct, the Court said, "Smith repeatedly solicited testimony from witnesses regarding those issues he now claims to be so prejudicial. We will not be misled by Smith's attempt to characterize his unsuccessful trial tactics as errors of the District Court."

The Court ruled against Smith on five other appeal issues. Among these, it found "that substantial credible evidence supported the jury's finding that Smith was justifiably terminated ..." The other four issues dealt with evidence and jury instructions; the Court affirmed district court on all issues.

Diemert v. State of Montana, Department of Labor & Industry, and Montana Deaconess Medical Center (1990) 242 Mont. 127, 788 P.2d 1355

Complicated legal process forms the heart of this decision. Josephine Diemert began the process by filing a wrongful discharge suit in October, 1985, against Deaconess in Great Falls. Since her application for unemployment benefits had been denied, she also filed against the Department of Labor and Industry (DLI) for judicial review of that decision. DLI moved for dismissal in December, 1986, and district court scheduled a hearing for January 29, 1987. However, DLI withdrew its motion on December 31. Nonetheless, district court dismissed the case on January 6.

Neither party received notice of the dismissal, and they both proceeded with discovery. On January 13, 1988, district court held a hearing on a discovery dispute, despite the court's dismissal of the case a year earlier. In May, 1989 (15 months later), the DLI attorney found the dismissal notice in the court file. Diemert moved for relief — a "dismissal of the dismissal," so to speak. District court scheduled a hearing for June, 1989 — then July — then September. The hearing never took place, and

the case was deemed dismissed under the Rules of Civil Procedure. Diemert appealed to the Supreme Court.

The Court first noted that district court had "no basis for a discretionary dismissal after the motion to dismiss had been withdrawn." Further, said the Court, "[w]e have reviewed the record and found no other basis for dismissal." Deaconess maintained that Diemert's motion to vacate the dismissal was not timely. The Court noted that the specific rule refers only to "a reasonable time." Since Diemert had never been notified of the dismissal until May, 1989, and then made her motion within 30 days of that date, the Court ruled she was entitled to relief. It reversed the dismissal and remanded the case for further proceedings.

Cummings v. Town of Plains, et al. (1990) *242 Mont. 236, 790 P.2d 486*

Here is another legal puzzle on par with *Diemert* (above). Lon Cummings was a part-time police officer for the Town of Plains. His position was budgeted through June 30, 1986, but the town council eliminated his position in January, 1986, citing budgetary considerations. The mayor then rehired Cummings as a relief officer. Cummings filed suit in June, 1986, and got involved in an effort to recall four council members. In October, 1986, the council informed the mayor via letter that it would not honor Cummings's employment. The mayor immediately terminated him, then reinstated him in November 1986. In January, 1987, the council held a closed meeting and then voted to terminate Cummings.

Cummings lawsuit had named the town and the four council members as defendants. All defendants moved for summary judgement, based on legislative immunity (2-9-111, MCA). District court granted the motion in November, 1988. Cummings then moved to amend his original ten-count complaint to four counts: breach of contract, two intentional torts, and a 42 USC § 1983 civil rights claim (1872 Federal Civil Rights Act). District court denied his motion, holding that immunity applied to the contract and tort claims and that Cummings had no grounds for the § 1983 claim. Cummings appealed.

The Supreme Court ruled only on the § 1983 issue. It held that Cummings had properly pleaded that claim and had raised sufficient issues of material fact to forestall summary judgement. The Court reversed and remanded the case.

Blume v. Metropolitan Life Insurance Company (1990) *242 Mont. 465, 791 P.2d 784*

Cylene Blume sued Metropolitan for wrongful discharge. The complaint was served through the office of the State Auditor and Commissioner of Insurance. Metropolitan received and logged the certified mail, but the documents were lost before anyone in authority saw it. Thus, the company never responded. Subsequently, a default judgement of almost $186,000 was entered against Metropolitan. The company immediately moved to vacate the judgement. District court did not act on the motion within the required time period, and the judgement stood. Metropolitan appealed.

The Supreme Court examined Rules of Civil Procedure, its own precedent, and the facts of the case. It found that "Metropolitan has satified all ... requirements for setting aside a default judgement." The company had "proceeded with utmost diligence" once it learned of the default judgement. Its "failure to appear was not due to any inexcusable neglect or disrespect for the court ..." And the Court noted that "[w]hen Metropolitan filed its motion ... it also filed a proposed answer to [the] complaint." The Court held this answer "sufficient to constitute a meritorious defense." Thus, the Court reversed the default judgement.

Birgenheier v. Trustees, Yellowstone County School Distr. #2 and Argenbright (1990) *242 Mont. 513, 791 P.2d 1388*

This case prompted the Supreme Court to modify the rule it had stated in the *Bridger* decision (1984, see p. 9). Carolyn Birgenheier was a nontenured teacher who, in the fall of 1985, signed an acknowledgement of temporary employment and a one-year contract to be an elementary music teacher in the Billings Public Schools. In April, 1986, the school district notified her by letter that her contract would not be renewed. The letter also encouraged her to apply for the position again.

Citing the teachers' union contract, Birgenheier appealed to the school board to state the specific reasons for nonrenewal. The school board gave no further reasons. Birgenheier appealed to the County Superintendent, who held that the school district was bound to provide her with specific reasons for nonrenewal. The County Superintendent concluded that the temporary, one-year contract arrangement was an attempt to evade the *Bridger* rule; he ordered Birgenheier reinstated.

The district appealed to the State Superintendent of Public Instruction, who reversed the decision. He held that the situation was covered, not by *Bridger*, but by terms of Birgenheier's contract. Birgenheier filed for judicial review, and district court ordered the district to comply with the *Bridger* rule and provide a statement of specific reasons why Birgenheier's contract was not renewed. The school district appealed.

The Supreme Court examined the procedure under statute governing termination of a nontenured teacher (20-4-206, MCA). It first found that the district had satisfied the requirement of the statute to give timely notice. The Court noted that Birgenheier's demand for a further statement of reasons for nonrenewal was grounded in the *Bridger* decision. "It is apparent," said the Court, "that *Bridger* has caused interpretive problems for the parties. In *Bridger*, the key statement was: 'The nontenured teacher is entitled to a notice which states what undesirable qualities merit a refusal to enter into a further contract.' That statement was not required for the holding in *Bridger*. In addition, it is somewhat inaccurate. It suggest that in the absence of undesirable qualities ..., a nontenure teacher may not be terminated. That is not the requirement of [the statute]."

The Court therefore overruled "the statement in *Bridger* that a nontenure teacher is entitled to notice which states what undesirable qualities merit a refusal to enter into a further contract." The law requires a statement, "but there is no statutory standard that the reasons must be somehow sufficient to merit a refusal ..." The Court's concluded that the district must furnish a statement "in reasonable detail." However, the Court emphasized "that the inadequacy of such a statement will not in any way affect the termination, assuming that timely notice of termination was given."

Heltborg v. Modern Machinery (1990) 244 Mont. 24, 795 P.2d 954

The covenant of good faith and fair dealing is no longer a cause of action in situations covered by the Wrongful Discharge from Employment Act. However, it may still apply to employment relationships exempted by the Act. (The discharge in this case occurred in 1986, so the Act did not apply.) The Supreme Court's narrow four – three decision here could have a profound effect on future cases dealing with the covenant of good faith and fair dealing.

Chris Heltborg worked for Modern Machinery, a heavy equipment dealer in Missoula. Starting as a mechanic, he worked for the company for 22 years, rising to the position of service manager. He suffered from some disabilities, including diabetes and congestive heart failure. In the early 1980s, Modern experienced severe business losses and went through cutbacks. In April, 1986, the company terminated Heltborg without prior notice and without severance pay, effective immediately.

Four months later, Heltborg died as a result of asphyxiation at home. His widow brought this suit against Modern, alleging breach of the covenant of good faith and fair dealing, negligence, and wrongful discharge. The last claim was dismissed through partial summary judgement. A jury trial on the remaining two counts resulted in an award of $170,608 to Heltborg's estate. Modern appealed on four issues.

The first issue dealt with expert witness testimony by an employment relations expert, Alan Brown. The Supreme Court noted that admissability of the testimony came down to "a distinction between testimony on the ultimate factual issue and testimony on the ultimate legal issue." The former is allowable, but not the latter. After examining the trial transcripts, the Court held that "the trial court committed reversible error in allowing Mr. Brown to state legal conclusions on the very issues to be decided by the jury."

The second issue attacked the issue of negligence. Modern contended the trial court had erred in instructing the jury on negligence, and in instructing the jury to consider whether Modern had negligently breached the covenant. The Court analyzed the issue at length, ultimately siding with Modern. In a departure from its point of view in previous "covenant cases," the Court said the disputed instructions "placed the jury in the middle of general management decisions, in effect eviscerating the concept of employer latitude in decision-making." The combination of expert testimony and jury instructions scrutinized Modern's actions "under a broad undefined 'reasonable care' standard. This type of decision cannot properly be scrutinized in hindsight for its legitimacy. Neither should negligence be based on the procedures of other employers."

The Court concluded that "[t]he breach of this duty [of good faith and fair dealing] considers the intentional conduct of any employer. We have not imposed upon the employer a duty to use reasonable care in decision-making, based on a theory of negligence. We conclude that the employer is not under a duty to use reasonable care ... Therefore, ... the management decision to implement a reduction in force for economic reasons is not susceptible to a negligence analysis by a jury."

On the third issue, Modern contested exclusion from evidence of a letter by Heltborg detailing his disabilities. After his termination, Heltborg had applied for Social Security benefits, which were denied. He appealed, and wrote the letter in question. At trial, Mrs. Heltborg succeeded in having the letter excluded. Yet she contended at trial that Heltborg should have remained employed in a lesser position as a mechanic. "The admissions by Mr. Heltborg in his letter," said the Court, "were certainly relevant to rebut this theory." Therefore, it should have been admitted.

The fourth issue on appeal was the trial court's denial of Modern's post-trial motion for a judgement notwithstanding the verdict. Modern contended there was no evidence to support the jury findings. The Court agreed that "negligence does not afford a cause of action," but held "that there existed issues of fact in regard to whether the covenant of good faith and fair dealing was breached ..." Despite its affirmation on this issue, the Court remanded the case for retrial on the other issues.

Justice Sheehy dissented, joined by Justices Hunt and Harrison. "The judicial climate here is not just frosty, it is freezing," wrote Sheehy; "Take this case. Please." His lengthy dissenting analysis castigated the majority on four issues:

> "The majority opinion overall has these principal effects, all deleterious to formerly accepted principles of law:
> (1) Limiting actions for breach of the implied covenant of good faith and fair dealing to intentional breaches, thus eliminating any cause of action for negligent breaches.
> (2) Delimiting the scope of expert testimony.
> (3) Confusing the latitude of employers to make business decisions with concepts relating to the covenant of good faith and fair dealing.
> (4) Preventing punitive damages even for intentional breaches of the covenant."

Koch, Pronovost, & Logan v. Yellowstone County, MetraPark & MetraPark Board (1990) 243 Mont. 447, 795 P.2d 454

This case dealt with the legislative immunity issue previously developed in the *Barnes, Bieber, Peterson,* and *Mitchell* cases (above). Here, the Supreme found that the defendants did not enjoy immunity. *(**NOTE:** The 1991 Legislature amended § 2-9-111, MCA, to effectively remove the shield in wrongful discharge situations. A text of the amended law is appended to this summary.)*

MetraPark, governed by the MetraPark Board, is the county fairgrounds in Billings. In May, 1987, the board reorganized the operation, resulting in the termination of the eight employees. Three of them filed suit, which fell to summary judgement on the basis of legislative immunity. Their cases were consolidated on appeal.

The Supreme Court first reaffirmed its stance on legislative immunity against the contention that it should apply only to legislative acts. It then examined the nature of the governmental entities named in the suit. "Yellowstone County is clearly a governmental entity" under the immunity statute (2-9-111, MCA), said the Court. Further, "the County is immune from suit if the MetraPark Board is a legislative body of the County or an agent thereof."

In analyzing the case, the Court examined the statutes that authorize county commissions to create county fair commissions such as the MetraPark Board. It also looked at the statutory powers of the the Board and concluded, "It is evident ... that the statutory powers of the MetraPark Board are limited to the management and operation of the Metra Civic Center and do not include any authority to make, alter, or repeal laws or rules." Lacking any legislative power, the Board would not enjoy immunity, unless it were an agent of the county commission.

On that question, the Court scrutinized the meaning of agency and its application in this case. "Here, there is not specific statutory grant of power to the [county commission] giving it the right to control ... the MetraPark Board relative to the employment function. With respect to the employment of personnel, the MetraPark Board has independently derived statutory powers granted by the legislature and thus is not subject to the control of the [county commission]. Therefore, ... the MetraPark Board is not the agent of the County Commissioners ... Accordingly, the MetraPark Board is not immune from suit ..." However, the Board and its members are officers of the county, and the county is subject to indemnify them for their official actions.

Fellows v. Sears, Roebuck & Co. and Moore (1990) 244 Mont. 7, 795 P.2d 484

This is another case, similar to *Brinkman* (p. 17) and *Smith* (p. 18) in which a union worker's claim in state court was preempted by federal labor law. Helen Fellows began working as a sales

clerk for Sears in Butte in 1975. In 1984, she transferred to a service clerk job at the request of management. Both positions were within collective bargaining units, but represented by different unions. At the time of the transfer, the store manager assured her she could transfer back to her old position at any time.

Sears laid Fellows off for a year in the fall of 1987. In the fall of 1988, Sears terminated her employment. She asked to be transferred back to her former position, but the manager denied it. Fellows sued in district court, alleging wrongful discharge and breach of the covenant of good faith and fair dealing. Sears moved the case to Federal District Court, and Fellows moved it back to state district court. The state court granted summary judgement to Sears, holding that Fellows's claims were preempted by the Management Labor Relations Act. The court said Fellows had failed to cite a violation of public policy and failed to state a cause of action under the Wrongful Discharge Act.

On appeal, the Montana Supreme Court affirmed the summary judgement. Fellows argued that the oral promise by the store manager was not grievable under the union contract and could be litigated under state law. The Court cited *Brinkman,* which held "that an aggrieved employee must at least attempt to utilize the grievance process provided for in the collective bargaining agreement." Here, Fellows "made no effort to avail herself of the remedies provided by the collective bargaining agreement."

Furthermore, said the Court, an agreement outside the union contract "is enforceable only so far as consistent" with the contract. The issues in Sears "promise" to Fellows were, in fact, covered by the collective bargaining agreement. Therefore, the summary judgement that federal law preempted Fellows's state claims were correct.

Harrison v. Chance (1990) 244 Mont. 215, 797 P.2d 200

This decision reversed *Drinkwalter v. Shipton Supply* (see p. 19), citing a legislative change that made the Montana Human Rights Act the exclusive remedy for sexual harassment.

Carol Harrison worked as a horse trainer for James Chance from September, 1986, to March, 1987. Her termination was voluntary, following what she said were constant sexual advances by Chance. She filed suit, claiming wrongful discharge, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, outrage, and tortious battery. District Court granted summary judgement to Chance on the grounds that Harrison was required to press a discrimination complaint before the Human Rights Commission, rather than a tort action in court. Harrison appealed.

Harrison relied on the Supreme Court ruling in *Drinkwalter v. Shipton* that the Human Rights Act was not the only remedy for sexual harassment. In this case, the Court stated, "We do not agree that *Drinkwalter* is controlling; a 1987 amendment to the Human Rights Act [§ 49-2-509(7), MCA] legislatively overruled *Drinkwalter."* The revised statute made the Human Rights Act the exclusive remedy for discrimination cases, and under the Act, all complaints go to the Human Rights Commission.

Harrison argued that the Court in *Drinkwalter* had said that sexual harassment is not necessarily a form of sexual discrimination. The Court called that statement a non-decisive dictum and deferred to "current authority," noting that the Human Rights Commission, all other states, and the federal government consider sexual harassment a form of sexual discrimination. The Court concluded, "We hold that sexual harassment is sexual discrimination under the Human Rights Act."

Harrison contended that Chance's conduct fell under the "bisexual exception" carved out by several federal courts. The exception says that an "equal opportunity lecher" who sexually harasses both males and females is not discriminating on the basis of sex, but may have committed a tort. Harrison alleged that Chance propositioned both her and her son, so she was entitled to press a tort action. The Court dispensed with her argument: "The record indicates that [Harrison] failed to raise the bisexual harassment theory until after the District Court issued its order granting summary judgment."

The Court also disagreed with Harrison's contention that Chance's conduct resulted in several torts: "It may be that the alleged acts provide grounds for ... tort claims. However, the gravamen of [Harrison's] claim is sexual harassment." Because all Harrison's claims revolved around the harassment, her only remedy was under the Human Rights Act.

The Court upheld summary judgement against several other arguments, too. The amended statute was applicable, even though the alleged acts took place before the law was passed; Harrison filed her

lawsuit six months after the law took effect. Applying the law did not violate any contract rights, a right to due process, nor equal protection.

In the end, though, the Court did not leave Harrison without remedy. Applying the doctrine of equitable tolling, the Court noted that Harrison might still present her complaint to the Human Rights Commission: "As a case of first impression holding that the legislature overruled *Drinkwalter*, this case should not prevent [Harrison] from having her claims heard by the Human Rights Commission."

Burgess v. Lewis & Clark City-County Board of Health (1990) 244 Mont. 275, 796 P.2d 1079
Legislative immunity again came under scrutiny in this case (see *Barnes, Bieber, Peterson, Mitchell,* and *Koch,* above). This case is particularly important, as it questioned whether immunity would apply under the Wrongful Discharge from Employment Act. The Supreme Court held it does. *(**NOTE:** The 1991 Legislature amended § 2-9-111, MCA, to effectively remove the shield in wrongful discharge situations. A text of the amended law is appended to this summary.)*

Sidney Burgess worked at a landfill in Lewis and Clark County, beginning in April, 1988. In July of the same year, the Board of Health terminated his employment for budgetary reasons but encouraged him to apply for another vacant position at the landfill. He did, but they hired someone else. Burgess brought suit under the Act, alleging the Board's actions violated its written personnel policies. He also requested that district court enforce an agreement to arbitrate.

District court dismissed Burgess's suit, holding that legislative immunity under 2-9-111, MCA, barred his claims. Burgess appealed, arguing that the Wrongful Discharge Act, passed in 1987, limited the immunity statute, passed in 1977.

The Supreme Court first analyzed the immunity status of the Board of Health. Since state law required the County Commissioners to approve all hiring and firing by the Board, the Court held that the Board was an agent of the County Commissioners and thus enjoyed immunity. Turning to Burgess's specific argument, the Court said, "Careful analysis of the Wrongful Discharge from Employment Act proves [his] argument unpersuasive. ... Nothing in the Act suggests a legislative intent to grant recovery where immunity statutes had previously denied recovery. Mr. Burgess has failed to present any logical support for his contention." Thus, held the Court, the immunity applied.

Burgess's appeal also contended he had a right to arbitrate the dispute under the policies of the City-County Health Department. The Court dispensed with his argument: "Mr. Burgess would have a right to arbitration only if he had completed the six-month probationary period. He has not done so and is therefore prohibited from seeking arbitration."

Harris v. Bailey, Livingston School Districts 4 and 1, and Argenbright (1990) 244 Mont. 79, 798 P.2d 96
In this case, William Harris came before the Supreme Court a third time in a string of litigation beginning in 1981. Harris had started working with the Livingston School in 1973. In 1980, his position was amended to school psychologist. In April of 1981, the district terminated his employment.

His administrative appeal eventually wound up with a determination in 1983 by the Supreme Court that he had tenure, and the case was remanded. The County Superintendent of Schools then determined the termination was improper and ordered him reinstated with back pay. That decision was also appealed, eventually to the Supreme Court, which in 1988 upheld the reinstatement but adjusted the back-pay award upward.

During the course of the second appeal, the school district acted in 1985 to terminate Harris's employment for "unfitness and incompetence." The termination was affirmed at the county superintendent, state superintendent, and district court levels; Harris appealed to the Supreme Court. The Court upheld his termination on all the issues considered in the appeal.

Harris argued that, although his employment as school psychologist was terminated, the district should be required to offer him a teaching position. The Court held that his argument was baseless, in light of both precedent and public policy. Harris also argued that the teacher termination statute (20-4-207, MCA) was incorrectly applied to his employment as a school psychologist, a "specialist." The Court noted that his first appeal resulted in Harris receiving statutory protection as a tenured teacher; "[h]is position at this juncture is totally at odds with this holding and is therefore contrary to both established law and his prior position ... in the earlier appeal."

Harris also sought to invoke the provisions of § 39-2-801, MCA, which requires an employer to provide a written statement of the reasons for termination or be "forbidden from utilizing any reasons

for discharge to justify the termination." Harris argued that, back in 1981, the district failed to provide written reasons after his first termination and therefore could not use any such reasons in justifying his 1985 termination. The Court ruled that § 39-2-801 was inapplicable, as Harris's case was governed more specifically by the teacher termination statute, § 20-4-207, MCA.

The Court also held that sufficient evidence existed in the record to support the finding that Harris was incompetent as a school psychologist. Harris did not contest the findings, but argued that he had no formal training as a school psychologist, so it was unfair to hold him to the standards set by the school district. The Court found his argument specious: "Harris was employed as a school psychologist and he accepted the position. He must be judged according to the competencies expected of someone holding such a position." In addition, the Court rejected Harris's arguments that the district had not followed proper procedures to terminate his employment.

Finally, the Court barred Harris from pressing a tort claim of breach of the covenant of good faith and fair dealing against the district. Relying on the legislative immunity statute (§ 2-9-111, MCA) and precedents (see *Barnes, Bieber, Peterson, Mitchell, Koch,* and *Burgess,* above), the Court held the district immune from any liability for bad faith. *(**NOTE:** The 1991 Legislature amended § 2-9-111, MCA, to effectively remove the shield in wrongful discharge situations. A text of the amended law is appended to this summary.)*

Cecil v. Cardinal Drilling Company (1990) 244 Mont. 405, 797 P.2d 232

In this case, the Supreme Court began to point out how it would interpret the "burden of proof" under the Wrongful Discharge from Employment Act of 1987. When the defendent employer claimed the termination was for a "legitimate business reason" (39-2-904(3), MCA), and the plaintiff claimed it was "not for good cause" (§ 39-2-904(2), MCA), the Court sided with the employer.

Donald Cecil began working for Cardinal Drilling in Billings in 1981. When the company president decided to retire in December 1987, an official of the parent company (Ocelot Industries of Canada) told Cecil he was in line to be the next president. Instead, he hired the former president of a competitor, and Cecil was promoted to executive vice president. In April, 1988, all Cardinal employees, including Cecil, received raises, and Cecil was promised further raises. In addition, the company increased its budget, anticipating a good year.

In July, 1988, Cardinal terminated Cecil's employment, without prior notice and effective immediately. The company offered severance pay on the condition that Cecil sign a release of any claims against Cardinal. Cecil refused and never received any severance pay.

In the eight months following Cecil's termination, Cardinal handed out raises and bonuses to its employees, expanded its drilling operations, and hired a new employee with duties identical to Cecil's. In September, 1988, Cecil filed several claims against the company. After the *Meech* decision (see p. 36), Cecil amended his suit to a single wrongful discharge claim under the Wrongful Discharge Act.

The company stated Cecil's termination took place in anticipation of declining oil prices; thus, it defended the decision on the basis of a legitimate business reason — the economic state of the company. Oil prices did, in fact, fall, and in deposition, Cecil admitted the decline was occurring when he was terminated. Citing the agreement of the parties on this fact, district court granted summary judgement to Cardinal, finding no genuine issue of material fact regarding the reason for the termination. Cecil appealed.

The Supreme Court first looked at the definition of "good cause" in the Wrongful Discharge Act; the Court also stated, "It is well-settled in the case law prior to the Act that economic conditions constitute a 'legitimate business reason.'" The fact was that oil prices were falling, and "once Cardinal made a sufficient showing of no material fact issues, the burden then shifted to Cecil to raise a factual issue sufficient to show that summary judgement was improper." "While Cecil claims to have been wrongfully discharged," the Court said, "he offers no other specific reason for his termination to contradict that he was terminated for economic reasons."

In its holding, the Court laid the burden at Cecil's feet to show that Cardinal treated him wrongly. "... Cecil did not offer any other motive or reason for his termination. He merely denied that the reasons were legitimate business reasons. And while the record might arguably show that it was possible for Cardinal to keep Cecil employed during the decline in oil prices, this Court cannot speculate as to what Cardinal's real reasons may have been, if they were in fact not as claimed."

Majerus v. Skaggs Alpha Beta, Inc., Jacobson, Fuglestad, and Krohmer (1990)
245 Mont. 58, 794 P.2d 1053

Doug Majerus worked for Buttrey Food stores for 15 years, rising to manager of a store in Missoula. In June, 1986, he took $350 from a till for a gambling trip to Nevada. He repaid the money about 16 days later. In August, the company fired him for taking the money. (Skaggs Alpha Beta was, at the time, the parent company of Buttrey Foods.)

Majerus filed for unemployment benefits, and the administrative case wound its way up to the Board of Labor Appeals. The Board upheld the results of a hearing that had found the termination proper and denied benefits to Majerus. He had the right to appeal that decision to district court for judicial review. Instead, he filed a tort action against Skaggs and three of its employees, alleging wrongful discharge, breach of the implied covenant of good faith and fair dealing, negligence, and negligent infliction of emotional distress. (His discharge preceded passage of the Wrongful Discharge from Employment Act.)

In August, 1989, district court granted summary judgement to the defendants. It based the decision on three grounds: 1) the doctrine of *res judicata* (see *Niles*, p. 44), 2) Majerus's failure to establish a breach of the implied covenant, and 3) the existence of no genuine issue of material fact to be decided at trial. Majerus appealed.

The Supreme Court disagreed with the district court's interpretation of *res judicata*. The Court noted that the decision rested on *Nasi* (see p. 25); however, the Court found the *Niles* case to be controlling and that district court had erred. "However," said the Court, "this does not necessarily mean that summary judgement was improper ..."

In this case, said the Court, "the defendants did not breach the implied covenant of good faith and fair dealing because they had a fair and honest reason to terminate Majerus — Majerus violated company policy when he admittedly took company funds ..." Although Majerus admitted this was wrong, he argued that termination was too harsh, but the Court found his argument "without merit." The termination was justified, and Majerus had no basis for a claim of breach of the implied covenant. Furthermore, said the Court, "no genuine issue of material fact exists, because the record reflects an admitted and serious breach of store policy arising from the misuse of employer's funds."

Deeds, et al, v. Decker Coal Company (1990) 246 Mont. 220, 805 P.2d 1270

In this case, the Supreme Court interpreted the "exemption" section (39-2-912, MCA) of the Wrongful Discharge from Employment Act (see appendix). It held that a case is not exempted until another "procedure or remedy" takes effect.

The case arose from a bitter strike at Decker Coal. The collective bargaining agreement expired in October, 1987, and about 230 miners went on strike. In June, 1988, their union, the United Mine Workers of America, negotiated a back to work agreement while bargaining continued on a new contract. Decker recalled about 80 of the miners, but fired 152 for "serious strike misconduct."

In November, 1988, the fired miners filed an unfair labor practice charge with the National Labor Relations Board. In June, 1989, they filed a wrongful discharge suit in district court. District court granted summary judgement to Decker on the basis that § 39-2-912 exempted the suit. The miners appealed.

The miners argued that subsection (1) of the Act applied only to discrimination cases. The Supreme Court disagreed: "We cannot interpret the statute so narrowly. Clearly, the statute's list is not meant to be all-inclusive, as shown by the term 'and other similar grounds.'" However, the Court found merit in the miners' argument on other grounds. For one thing, the suit was not exempted by the existence of a collective bargaining agreement, since there wasn't one; "[i]t was the expiration of their collective bargaining agreement that set this litigation in motion."

Secondly, said the Court, "no other state or federal statute providing a procedure or remedy for contesting the dispute has yet taken effect, thereby exempting this dispute." The National Labor Relations Board had taken no action on the unfair labor practice charge. "Should the NLRB eventually decide to enter into the dispute by filing a complaint on behalf of the discharged employees," said the Court, "a 'procedure or remedy for contesting the dispute' would be set in motion, and the statutory exemption of § 39-2-912, MCA, would apply. As yet, no such procedure has taken place ... "

The Court wanted to make sure that the dispute could be settled somewhere: "To ensure appellants a forum in which the dispute may be resolved, this cause is ... remanded to the District Court, with the proceedings stayed pending NLRB action."

Barrett v. Asarco Incorporated (1990) "Barrett II" *245 Mont.196, 794 P.2d 1078*

This decision resulted from the second appeal in long and complex litigation that began in 1985. A summary of the first appeal appears on p. 28. After that appeal, another trial took place, and the jury found for Robert Barrett, awarding $230,000 in compensatory damages. Asarco appealed.

The Court first examined whether "substantial credible evidence" supported the jury's conclusion that Asarco had breached the covenant of good faith and fair dealing. Conceding that the two parties presented "very different versions of the events surrounding Barrett's termination," the Court nonetheless found that Barrett's evidence supporting his case was sufficient. "The jury as fact-finder chose to believe Barrett's version of the conflicting evidence," said the Court. "We will not disturb the jury's determination ... because it is supported by substantial credible evidence."

Asarco also contested admission by transcript of testimony from the first trial into the second. The witness in question was Barrett's brother; he testified at the first trial, but was unavailable to testify at the second trial. Asarco argued that Barrett had made insufficient efforts to get his brother to the second trial. The Court disagreed, finding that Barrett had a reasonable explanation for his brother's absence and that district court, in its discretion, accepted it. "In short," concluded the Court, " Asarco has failed to meet its burden."

The Court also turned down an argument by Asarco concerning a jury instruction. The district court had rejected a proposed instruction from Asarco regarding the issue of termination pay. (At the time of Barrett's discharge, his boss had prepared his final paycheck prior to meeting with Barrett. Barrett used this fact as evidence that the boss was out to get him.) The Court found that Asarco's " proposed instruction would have only served to confuse and mislead the jury."

Finally, Asarco contended that Barrett's attorney had engaged in several instances of misconduct during the second trial. The Court, however, could "find no error warranting a new trial. Asarco failed to object to the comments of Barrett's attorney alleged as misconduct ..." The Court concluded this issue on a rule of precedent: "Failure to object to alleged error at trial precludes an appellant from raising that issue on appeal." Thus, the Court unanimously found in Barrett's favor on all issues.

Martin v. Special Resource Management, Inc., Entech, Inc., and Montana Power Company (1990) *246 Mont. 181, 803 P.2d 1086*

This case arose on the "cusp" of the time period when the Wrongful Discharge from Employment Act went into effect. The appeal examined the question of when a cause of action arises — when the employee is notified of her termination, or when it takes effect.

Barbara Martin began working as a clerk-typist for Montana Power (MPC) in 1976. In 1986, she got a job working for Special Resource Management (SRM). SRM is a subsidiary of Entech, which is in turn a subsidiary of MPC. On June 16, 1987, Martin received a letter from SRM's new president, saying her job had been eliminated through a reduction in force. The effective date of her termination was July 17, 1987. (The Wrongful Discharge from Employment Act took effect July 1, 1987.)

Martin, however, learned that her position was not to be eliminated, but to be filled by the president's personal secretary from his previous job at another MPC subsidiary. As a result, Martin filed suit on June 28, 1988, alleging wrongful discharge, breach of the covenant of good faith and fair dealing, and negligence. SRM asked for summary judgement, which district court granted; the court held that the Wrongful Discharge from Employment Act preempted Martin's tort claims, since her actual termination took place after the Act had taken effect. Martin appealed.

The issue facing the Supreme Court was, at what point did an actionable cause for termination arise — upon notice of the termination or when it took effect? The Court could find no case law in Montana to answer the question. Looking at case law from other jurisdictions, the Court found that "the proper focus, for statute of limitations purposes, was when the act occurred, not when the final consequences came about." Thus, the Court held for Martin "that her cause of action accrued upon notice of her termination." The Court reversed the summary judgement and remanded the case.

Doohan v. Bigfork School District No. 38, Chrysler, and Cochrane (1991) 247 Mont. 125, 805 P.2d 1354

This case dealt substantially with the question of constructive discharge and due process. The Supreme Court split four – three on the decision, which reversed a jury verdict for the plaintiff. The Court also refused to yet recognize a claim of intentional infliction of emotional distress in conjunction with a discharge case.

Thomas Doohan worked as Superintendent for the Bigfork School District for two contract terms, from July, 1983, to June, 1985. He retired on medical disability. He then sued the district and two of the school board members (Chrysler and Cochrane), claiming constructive discharge and intentional infliction of emotional distress. Doohan's claims focused on allegations that the defendants made his working conditions intolerable, resulting in the medical conditions that led to his retirement. A jury trial resulted in awards of $87,500 against the District, $12,500 against Cochrane, and $1 against Chrysler. The defendants appealed.

The Court first looked at Doohan's claim that his rights under 42 USC § 1983 (1872 Civil Rights Act) were violated. At issue was a specific jury instruction dealing with due process. The Court found that "[t]he instruction essentially directed a verdict for Doohan on his § 1983 claim because it incorrectly focused on the idea of constructive discharge 'without a hearing,' and tells the jury that it may find that Doohan was deprived of due process if they find such. However, there was no issue as to giving notice or hearing in this case ... . Nor is lack of notice and hearing unusual in a constructive discharge claim. Nevertheless, once the jury found a constructive discharge, they were directed to find a violation of the plaintiff's due process rights."

After looking at several state and federal cases, the Court held that district court "erred in instructing that it could find a deprivation of due process if it merely found a constructive discharge .... Under the law we adopt here, a § 1983 claim based on harassment at work requires additional proof of the employer's subjective intent to deprive the employee of his due process hearing." In Doohan's case, the school board had asked for his resignation, then withdrew the request to afford time to look into due process requirements. It would be up to the jury, the Court said, to determine if the board was sincere in its concerns; if it were, no deprivation of due process could be found. If the jury found the board's actions were a sham to get rid of Doohan and deprive him of a hearing, Doohan could have a claim under § 1983. However, the district court had not enabled the jury to consider that question, resulting in reversible error.

Another issue under appeal was whether the school district was immune from damages. The defendants pointed out a U.S. Supreme Court decision that "government officials are immune from civil liability as long as their conduct does not violate clearly established law." However, the Montana Supreme Court pointed out that "§ 20-4-401, MCA, plainly delineates how a school board must terminate a superintendent." If the board constructively discharged Doohan, then it violated the law. The school board also tried to claim immunity under legislative immunity (§ 2-9-111, MCA), but the Court held the immunity was not available for the § 1983 claim, brought under federal law. Therefore, held the Court, the school district was not immune from damages.

A third issue addressed Cochrane's and Chrysler's liability for intentional infliction of emotional distress. The Court recognized it had "not yet dealt with a case which merits recognition of a separate cause of action for the intentional infliction of emotional distress." In the Court's opinion, this case fell short as well. After a study of the evidence presented by Doohan, the Court held, "the alleged actions of Chrysler and Cochrane ... fail to approach the threshhold of 'outrageousness' necessary to to establish a prima facie case of intentional infliction of emotional distress." Thus, the district court should not have allowed the claim to go before the jury.

The ultimate result of the appeal was a reversal of the jury verdict. The case was remanded for retrial only on Doohan's § 1983 claim under the new standard adopted by the Court.

Justice Weber dissented, with the concurrence of Justices Sheehy and Hunt. Weber argued that majority adopted and retroactively applied a new standard from the federal Fifth Circuit. "That rule," wrote Weber, "is not universally recognized and it was not argued in the parties' briefs. I do not agree that it is a workable rule. I find it inappropriate to retroactively apply such a new standard." Weber further concluded that the record supported Doohan's claim of intentional infliction of emotional distress, "because the evidence of the defendants' acts reached the threshold level of 'outrageousness.'"

Easton v. Cowie, d/b/a/ Cowie Crane Service and *Cowie, d/b/a/ Cowie Crane Service v. Easton (1991) 247 Mont. 181, 805 P.2d 573*

This brief decision dealt with the propriety of summary judgement when the plaintiff had failed to respond to requests for discovery within the prescribed time period. The Supreme Court affirmed the summary judgement.

Ernest Easton had filed a wrongful discharge suit against Rex Cowie on August 14, 1989. Cowie countersued for the down payment and value in materials pertaining to a mobile home Easton had bought from Cowie. On July 26, 1990, Cowie served discovery requests on Easton. Under Rules of Civil Procedure, Easton had 30 days to respond, plus mailing time, making the deadline August 28. Easton responded on September 14, but Cowie had already moved for summary judgement the day before.

District court granted the summary judgement to Cowie, dismissing the wrongful discharge claim. On appeal, the Supreme Court found no abuse of discretion by the district court. The summary judgement stood.

Buck v. Billings Montana Chevrolet, Inc., Frontier Chevrolet Co., FS Enterprises, Stinson, and Menholt (1991) 248 Mont. 276, 811 P.2d 537

In this important five – two decision, the Supreme Court formulated a definition of "legitimate business reason," a phrase in the definition of "good cause" within the Wrongful Discharge from Employment Act. The Court's action expanded the approach it took in *Cecil v. Cardinal Drilling* (see p. 52).

James Buck began working for Frontier Chevrolet, his father-in-law's business, in 1973. He rose on his own merit to become general manager, and he was widely recognized in the auto business. Frank Stinson, majority shareholder of FS Enterprises, began negotiations to buy Frontier in 1986. Stinson's established practice was to buy dealerships and install long-term employees as managers.

The final sale agreement between Stinson and Frontier required all officers and directors of Frontier to resign, but not its employees. Buck was not an officer or director. After completion of the sale in August, 1987, Stinson named an FS Enterprises employee, Dennis Menholt, as executive manager. Menholt terminated Buck's position as general manager; he later offered Buck the job of Fleet and Lease Manager, which Buck refused.

Buck's lawsuit against the several defendants listed above fell to summary judgement. District court ruled that Stinson's practice of placing his own employee in charge of the newly acquired business constituted a legitimate business reason for Buck's discharge. Buck appealed.

The Supreme Court took a long, hard look at the case. First, it determined that "Buck was not a probationary employee. Therefore, in order to establish a claim for wrongful discharge ... he must prove that his termination was not for good cause." This sentence confirms and furthers the direction the direction the Court pointed in *Cecil:* the burden of proof that a discharge was not for good cause will fall on the discharged employee.

In Buck's case, the parties agreed that his performance was satisfactory and he had not disrupted the operations of the business. Instead, the employer said a "legitimate business reason" validated Buck's discharge. In examining this defense, the Court researched the phrase for guidance or precedent on how it should be applied. The Court's efforts were stymied: "This review has been of little assistance. All attempts to more specifically define the term or like terms have resulted in definitions that are as general as the term itself."

The Court thus formulated its own definition of "legitimate business reason":

> A legitimate business reason is a reason that is neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business. In applying this definition, one must take into account the right of the employer to exercise discretion over who it will employ and keep in employment. Of equal importance to this right, however, is the legitimate interests of the employee to secure employment.

In applying this definition to Buck's case, the Court noted Stinson's long-running policy of placing his own employees in charge of newly purchased businesses. Noting that Stinson made a "large investment" in Frontier Chevrolet, the Court recognized that this practice enabled Stinson to "place a long term employee, in whom he held great trust, to manage that investment." In addition, the arrangement was a means for Stinson "to reward long term employees." The Court's conclusion?

> It would be against common sense and rationality for this Court to hold that such reasons or grounds do not constitute a legitimate business reason ... In this case, Buck has not argued these reasons for replacing him were false. Instead, he has steadfastly maintained that these motivations were not justified by the Wrongful Discharge from Employment Act. Because Buck has not come forward with any evidence showing bad faith or falsehood, we hold summary judgement was properly awarded.

The Court stopped short of granting new owners a free hand in cleaning house: "We caution, however, that this holding is confined only to those employees who occupy sensitive managerial or confidential positions. An owner under these circumstances may not hold the right to terminate employees who hold duties which do not require the exercise of broad discretion."

The Court also dealt for the first time with the issue of punitive damages under the Wrongful Discharge from Employment Act (§ 39-2-905(2), MCA). Buck claimed that the manner in which he was discharged constituted "actual fraud," but the Court gave his argument little merit. The "clear language" of the punitive damages section applies only to employees discharged for refusing to violate public policy or for reporting a violation of public policy, said the Court. "There is no evidence Buck reported or refused to violate public policy and he is therefore precluded from obtaining punitive damages under the Act."

Another issue on appeal was whether district court had properly granted a motion to dismiss Frontier-Montana, FS Enterprises, Frank Stinson, and Dennis Menholt as defendants. The Court analyzed the complex business manipulations that split to original dealership into two corporations: Billings Montana Chevrolet and Frontier-Montana. It concluded that Frontier-Montana was properly dismissed as a defendant.

Buck argued that "it was inconsistent ... to dismiss Stinson and Menholt from the lawsuit and at the same time take their interests into consideration" in saying the discharge was legitimate. The Court disagreed:

> First, a corporation, in and of itself, being an inanimate object, is incapable of formulating its own interests and policies. Rather its interests are formulated by the officers, directors and employees who carry out corporate business. With limited exceptions, these persons are generally immune from lawsuits arising out of corporate affairs.
>
> Second, the Wrongful Discharge from Employment Act provides the exclusive remedy for wrongful termination. All remedies provided by the Act run against the employer. The Act does not envision lawsuits against corporate employees, officers or shareholders. In this case there is no question that Buck's employer was Billings Montana Chevrolet. It was not the employees or shareholders of the Billings Montana Chevrolet. Therefore, as mere shareholders or officers of Billings Montana Chevrolet, Stinson and Menholt were properly dismissed from the lawsuit.

This holding appears to establish an important new direction, disallowing the prosecution of individuals, such as managers or executives, in wrongful discharge lawsuits.

Finally, Buck had agreed in district court to the dismissal of FS Enterprises as a defendant. The Court went no further than that fact in upholding the dismissal. In addition, the Court required Buck to pay attorney fees and court costs incurred by FS Enterprises from the time of its initial dismissal as a defendant.

Buck's cause was not, however, entirely lost. He cited the company personnel manual "which assured his continued employment if his job performance and economic circumstances remained satisfactory." This gave Buck the footing to maintain his discharge violated the employer's written personnel policy, establishing a claim from wrongful discharge under § 39-2-914(3), MCA. The employer pointed out that it had offered Buck the job of fleet manager. Buck, however, maintained this action was a ploy to avoid a lawsuit and to set him up for later dismissal. The Court held, "If these facts are true, it is possible Buck may have a cause of action ..." The Court reversed summary judgement and remanded the case on these grounds alone.

Justice Trieweiler dissented "from that part of the majority opinion which holds that as a matter of law plaintiff's employer has 'reasonable job related grounds for dismissal based upon ... legitimate business reasons.'" He recalled the reasoning the Court used when it upheld the constitutionality of Wrongful Discharge from Employment Act (see *Meech v. Hillhaven*, p. 36): "In balancing the rights of employers and employees to determine where there was rational basis for the Act, this Court

concluded that the 'good cause' protection of the Act was a significant factor." Now, said Trieweiler, the Court "begins the erosion of that same 'good cause' requirement which was previously found to be the quid pro quo for rights which have been taken away from employees under the Act."

Trieweiler pointed out that Stinson had decided Menholt would manage the next dealership he purchased "before he ever looked at Frontier Chevrolet, and before he ever met James S. Buck." Since Buck was doing well as manager of the dealership, Stinson's decision affected only his own interests and "had nothing to do with legitimate business reasons of the company which employed [Buck]." "It is logically inconsistent," reasoned Trieweiler, "to dismiss Frank Stinson [as a defendant] ..., but then to consider Frank Stinson's business interests as justification for termination of [Buck]." Trieweiler concluded that Buck "was at least entitled to a jury trial" to determine if his termination was proper.

Justice Hunt concurred in the dissent.

Irving v. School District No. 1-1A, Valley County, and Board of Trustees (1991)

248 Mont. 460, 813 P.2d 417

This teacher-school district dispute is complex and unique: the teacher's complaint extended far beyond judicial review of an administrative decision. After her lawsuit was dismissed entirely by district court, the Supreme Court, splitting five – two, remanded the case to be heard on the teacher's complaints of fraud and a violation of 42 USC § 1983 (1872 Federal Civil Rights Act).

Debra Steffani Irving (Steffani) began teaching part-time at Glasgow High School in October, 1985. She was employed full-time the following two academic years. Her evaluations rated her teaching ability as above average. The high school principal had recommended against her receiving a contract for the third year, but the school board renewed her contract for that year. She did not receive a fourth contract, did not achieve tenure, and was not rehired in 1988. When Steffani requested the reasons for nonrenewal, the school board wrote her that declining renewal necessitated a reduction in force.

Steffani filed an appeal with the County Superintendent of Schools. She also filed a lawsuit alleging breach of contract, bad faith, fraud, violations of state and federal constitutional provisions, and violation of § 1983. When the County Superintendent and State Superintendent of Public Instruction denied her appeal on lack of jurisdiction, she added a request for judicial review to her lawsuit. District court dismissed all counts, saying Steffani had failed to state a claim for which relief could be granted. Steffani appealed to the Supreme Court.

1. The Supreme Court upheld the dismissal of Steffani's request for judicial review. As a non-tenure teacher, she was not entitled to a hearing under Montana law. Steffani also complained that the school board violated the Open Meeting Act. The Court noted that the law allows a plaintiff to have a decision, made in an illegally closed meeting, voided. "Steffani has not, however, sought to void the decision of the School Board," said the Court. "Instead, she has sought monetary damages." Such damages would not arise from the act of closing the meeting and would be recoverable under other aspects of her lawsuit, reasoned the Court.

2. Steffani had leveled two allegations of fraud against the school district: one, giving a false reason for her discharge, and two, misleading her into believing she would be interviewed for a part-time teaching position for the 1988-89 school year. The Supreme Court upheld the dismissal of the first allegation. Since Steffani said the principal had told her her would "get her next year" when she received her third contract, she could not logically demonstrate a belief in the reason given by the school board. However, on the second allegation, the Court found that all the elements were present to litigate a claim of fraud.

3. Steffani argued that the school district breached the collective bargaining agreement between the district and the teachers' union. She argued she had more actual seniority than the tenured, part-time teacher who was hired to fill part of her teaching duties. This argument carried no weight with the Court, since the collective bargaining agreement protected seniority only for tenured teachers, and Steffani was non-tenured.

4. Steffani alleged that her discharge violated the Wrongful Discharge from Employment Act. The Court noted the Act specifically exempts "an employee covered by a written collective bargaining agreement," and upheld the dismissal of that count.

5. The Court also upheld the dismissal of Steffani's claim that the school district had breached the implied covenant of good faith and fair dealing. Under the *Brinkman* rule (p. 17), a bad faith claim is barred when the employee is covered by a collective bargaining agreement, as Steffani was.

6. The Court dealt briefly, but significantly, with Steffani's complaint under § 1983. Her count alleged that the defendents, acting under color of state law, had violated her rights to equal protection, free speech, free association, and due process. "On the basis of the District Court's memorandum," said the Supreme Court, "it is impossible to discern the exact reasons for the dismissal of Steffani's § 1983 claims. Her complaint, however, appears to adequately set forth a claim for relief."

The Supreme Court's decision, then, upheld the dismissal of all counts except Steffani's second allegation of fraud and her claim under § 1983. These two counts were remanded to district court.

Justice Trieweiler, joined by Justice Hunt, dissented. The basis of the dissent was the incomplete record from district court. Steffani was entitled to an explanation for the dismissal of all counts, but district court had addressed only two. "It is particularly troubling," wrote Trieweiler, "that on the basis of this inadequate record this Court would enter such an expansive decision ..."

Allmaras v. Yellowstone Basin Properties and Patten Corporation; Rios v. Yellowstone Basin Properties and Patten Corporation (1991) *248 Mont. 477, 812 P.2d 770*

The separate complaints by Russell Allmaras and Richard Rios against their employer were consolidated in district court and in the Supreme Court. This brief opinion denied the plaintiffs' constitutional challenges to the Wrongful Discharge from Employment Act.

Allmaras and Rios worked as real estate agents for Yellowstone Basin Properties, a wholly owned subsidiary of the Patten Corporation. Following the termination of their employment with the company, they filed suit. The Supreme Court opinion provides no details regarding their employment or termination; it deals with the following legal issues.

Allmaras and Rios filed three counts in their lawsuit: (1) statutory wrongful discharge, (2) common law discharge, and (3) breach of the implied covenant of good faith and fair dealing. District court dismissed the latter two counts in summary judgement for Yellowstone. A jury trial on the first count resulted in a verdict in favor of Yellowstone. Allmaras and Rios appealed.

The plaintiffs argued that the Wrongful Discharge Act violated their constitutional right to a jury trial. Since the Act places a cap on damages for wrongful discharge, they contended, it violates their right to have the jury determine damages. The Court ruled Allmaras and Rios had no standing to raise this issue: "The jury determined that Allmaras and Rios were not wrongfully discharged. Based on this jury verdict, Allmaras and Rios are not entitled to damages ... and therefore cannot claim to be injured by the cap on damages contained in the Act."

Allmaras and Rios also argued that the Act violated the privileges and immunities clause and the equal protection clause of the Montana Constitution. The Act exempts employees covered by a collective bargaining agreement or individual written contract; the plaintiffs said this exemption unfairly prevented them from pursuing their common law actions (Counts 2 and 3), yet exempt employees would be allowed to do so, thus violating equal protection.

The Court disagreed that the Act had unfairly changed the common law: the tort claims Allmaras and Rios wanted to pursue had previously be available only to "at-will" employees; the Act preempted such tort claims with statutory remedies, also available only to at-will employees. Once the Court established this reasoning, it again held that Allmaras and Rios had no standing to challenge the constitutionality of the preemption clause, for they had lost their lawsuit under the Act.

Count 3 had alleged a breach of the implied covenant of good faith and fair dealing. Allmaras and Rios contended it was unconstitutional for the legislature to eliminate this cause of action by passing the Act. The Court relied on the *Meech* decision (see p. 36) in reiterating that "no one has a vested interest in any rule of common law." This holding refused the plaintiffs' claim of unconstitutional deprivation.

Allmaras argued that the Wrongful Discharge Act impaired the obligation of contracts. He claimed he had been hired by Yellowstone on or about July 1, 1987 — the effective date of the Act. Thus, his contract had been established prior to the Act taking effect. Article II, § 31 of the Montana Constitution disallows any law impairing the obligation of contracts already in place. However, said the Court, "Allmaras presented no evidence that the parties entered into an agreement prior to July 1, 1987," so he had no basis for his argument.

Finally, the plaintiffs argued that the Wrongful Discharge Act violated their constitutional right to due process. However, noted the Court, Allmaras and Rio offered no authority or explanation for their contention, so the Court refused to consider it.

Kittleson v. Archie Cochrane Motors, Inc. (1991) *248 Mont. 512, 813 P.2d 424*

This case stemmed from a discharge, but the lawsuit stemmed from the employer's refusal to grant severance pay. Gary Kittleson worked for Archie Cochrane Motors (ACM) for 17 years, working his way up to General Sales Manager. Over a period of 20 months, according to the owner, Jim McNally, Kittleson's performance went downhill, leading to a demotion to truck manager and, finally, termination of his employment in August, 1986.

After his discharge, Kittleson asked McNally about getting severance pay. McNally said he would take Kittleson's reasons for getting severance pay to the firm's board of directors. McNally also allegedly agreed that Kittleson deserved severence pay. The board rejected Kittleson's request. About a year later, McNally wrote a letter of recommendation for Kittleson, backdated to the time of termination. In addition, the firm subsequently provided severance pay to two terminated employees.

Kittleson sued the dealership, alleging negligent discharge, negligent infliction of emotional distress, breach of the implied covenant of good faith and fair dealing, and breach of contract for refusing to grant severance pay. District court granted summary judgement to ACM, saying no material fact issues were present for litigation. Kittleson appealed.

Kittleson argued that several issues merited litigation: whether he was entitled to severance pay under provisions of the employee handbook, whether his discharge stemmed from an act of improper conduct, whether McNally's statements about Kittleson deserving severance pay imposed an obligation on ACM, and whether McNally actually presented the question of severance pay to the board of directors. The Supreme Court examined Kittleson's legal claims and the facts of the case.

First, the Court dispensed with Kittleson's claim of negligent discharge. Based on its decision in *Heltborg v. Modern Machinery* (see p. 48), the Court no longer would recognized a claim of negligence in a discharge case. However, the Court examined more closely whether ACM had breached the covenant of good faith and fair dealing. Kittleson cited ACM's employee handbook, which stated, "If you are separated for cause, whether ... you are given severance pay depends upon the reason you were leaving ..., and each case will be handled individually. Severance pay will not be given, however, for separation because of an act of improper conduct."

Kittleson contended that he had not been fired for an act of improper conduct, so he was entitled to the pay. The Court disagreed: "[W]e need not decide whether Kittleson was discharged for 'an act of improper conduct.' The language of the employee handbook clearly states that 'each case will be handled individually' in deciding whether severance pay is given." Further, said the Court, "[t]he actions of the ACM Board of Directors ... comply with the ACM policy .... McNally's statement that Kittleson had severance pay coming if anyone did is neither a promise to Kittleson that he would receive severance pay nor a representation that the Board decision would be in Kittleson's favor." Therefore, no breach of the covenant of good faith and fair dealing occurred.

Finally, the Court noted that Kittleson's breach of contract claim had no merit, as the employee handbook was not a contract. And, said the Court, the claim of intentional infliction of emotional distress was "without basis."

Mannix v. Butte Water Company and Washington (1991) *249 Mont.372, 216 P.2d 441*

This decision by the Montana Supreme Court was narrow in two respects: it focused only on the dismissal of Dennis Washington as a defendant in the case, and it came down with a four – three majority. The decision left Mannix's claims against the Butte Water Company in place and proceeding in district court.

Gary Mannix started working for the Butte Water Company in 1973, and he presided over it from 1983 to 1985. Throughout his tenure, the company was owned by Atlantic Richfield (ARCO). In December, 1985, Dennis Washington purchased the company from ARCO. During the purchase negotiations, Mannix balked at indebting the company with a $2 million loan that Washington would assume when he took ownership. Mannix eventually participated in authorizing a board member to execute the loan.

During the negotiations, Washington had caught wind of Mannix's intransigence. Two days after the sale took effect, a member of the new board of directors, acting under Washington's authority, fired Mannix. Mannix filed suit, claiming wrongful discharge and breach of the covenant of good

faith and fair dealing. The original defendants to the suit were ARCO, Anaconda Minerals, Washington Corporations, Dennis Washington, and the Butte Water Company. The first three corporations were dismissed as defendants, and a later summary judgement dismissed all claims but one ("piercing the corporate veil") against Dennis Washington. Mannix appealed Washington's dismissal as a defendant.

Mannix alleged that his discharge was a retaliatory action by Washington, based on Mannix's refusal to indebt the water company prior to its sale. The Supreme Court examined whether "a genuine issue of material fact" existed to overrule summary judgement. In the majority's opinion, there wasn't.

Mannix argued that his discharge ran against the best interests of the water company. The Court noted this might be a legitimate issue, but said, "It is clear that the disagreement about whether it was in the Water Company's best interests to sign the $2 million note was actually between Mannix and ARCO .... Moreover, Mannix has failed to present any facts supporting the argument that signing the note was against the best interests of the company."

After further examining the record of summary judgement, the Court also held that no evidence supported any theory that Washington's action was taken for his own pecuniary benefit. The Court also rejected the possibility that Mannix's discharge was an act of personal retaliation by Washington: "Although he has made an extensive argument, Mannix simply has not brought out any facts to support his position that Washington personally terminated Mannix's employment ... in retaliation for his refusal to sign the $2 million note."

Justice McDonough dissented, joined by Justices Hunt and Treiweiler. McDonough examined the record in light of Washington's possible "intent or motive." "For purposes of summary judgement," wrote McDonough, "the issue for consideration is: whether on these facts, a reasonable inference can be made that Mr. Washington retaliated and intended to punish or harm the plaintiff for his actions in placing an obstacle in the path of the closing of the sale."

Because a determination of motivation would be critical to the ultimate finding of fact, the dissentors considered summary judgement to be inappropriate. McDonough pointed out several precedents that have formed the rule, "If improper motive can reasonably be inferred from the evidence, sworn denial does not entitle a defendant to summary judgement." On this rule, McDonough would submit the uncontested facts to a jury and allow it to determine Washington's intent and motive.

Dagel v. City of Great Falls (1991) "Dagel I" 250 Mont.224, 819 P.2d 186

In this case, the Supreme Court clarified the exemption in the Wrongful Discharge from Employment Act for employees under a union contract. The Court also 1) opened the door for tort claims that, at first blush, seem to be preempted by the Act, 2) clarified plaintiffs' eligibility to press a 42 USC § 1983 claim (1872 Federal Civil Rights Act), and 3) reformulated its principle of equitable estoppel.

The case began with Carlene Dagel's resignation from the Public Works Department of the City of Great Falls in November, 1987. She had worked there for three years under the supervision of Charlis Manzer. Dagel said that Manzer had continuously harassed her in the job, subjecting her to several disciplinary actions ranging from counselling to suspension. Dagel felt this treatment was the cause of severe emotional problems, so she quit when the suspension was imposed.

Dagel's position was normally covered by a collective bargaining agreement. However, the time of her resignation fell within the "notch" between the expiration of one contract and the execution of a new one. When Dagel and the union tried to file a grievance over the suspension, the city rebuffed them: "[T]here was no contract and no grievance procedure in effect or available ... at the time of the suspension." The City also stated that Dagel voluntarily resigned, thus forfeiting any right to a grievance procedure.

Dagel filed suit against the City, claiming wrongful discharge, violation of her constitutional rights (§ 1983), breach of the covenant of good faith and fair dealing, and intentional and negligent infliction of emotional distress. She later moved to include Manzer as a defendant in the lawsuit. District court granted summary judgement to the City, and Dagel appealed.

The Supreme Court first disposed of Dagel's § 1983 claim. The Court noted the distinction between whether the City itself or Manzer, its employee, had deprived Dagel of her rights. Since Dagel specifically cited Manzer as the actor, her allegations essentially were based on the theory of respondeat superior, in which the employer is liable for the actions of it employees. Under a 1978 U.S. Supreme

Court ruling, respondeat superior "is not a valid basis for recovery under § 1983." The Montana Supreme Court rejected any arguments that Manzer had "final policymaking authority" and held that Dagel's § 1983 claim was invalid.

In summary judgement, district court had held that Dagel's claims were barred by legislative immunity under § 2-9-111, MCA (see *Barnes, Bieber, Peterson, Mitchell, Koch, Burgess,* and *Harris,* above). The Supreme Court noted that the 1991 legislature had amended § 2-9-111 (see appendix) to distinguish between administrative and legislative acts. Since Mazer's supervisory actions were "clearly" not legislative acts, the Court held that the City is not immune.

District court had also held that Dagel was covered by a written collective bargaining agreement at the time of her discharge, so her lawsuit was exempted under the Wrongful Discharge Act (39-2-912, MCA; see appendix). The Supreme Court noted, "Clearly the City's position that there was no contract and no grievance procedure available to the plaintiff contradicts its later position that there was a collective bargaining agreement which bars her right to sue. Our question," the Court continued, "is whether such contradictory positions are barred under statute or case law."

The Court analyzed at length its prior case law regarding equitable estoppel and a specific statute relating to evidence (§ 26-1-601, MCA). Of importance here is the result: the Court held "that the City may not contend that the plaintiff was covered by a written collective bargaining agreement at the time of her discharge." This ruling allowed Dagel to "proceed with her suit under the Wrongful Discharge from Employment Act."

Dagel's lawsuit included tort claims regarding breach of the covenant of good faith and fair dealing and infliction of emotional distress, both intentional and negligent. District court had held these claims preempted by the Wrongful Discharge Act (§ 39-2-913; see appendix). The Supreme Court noted that Dagel cannot bring tort claims under the Act. "However," said the Court, "plaintiff claims that many of the acts occurred prior to July [1,] 1987, the effective date of the ... Act. It may be that plaintiff will desire to amend her complaint in order to more clearly allege acts which occurred prior to the effective date of the Act, which would allow a pre-Act claim for those damages otherwise excluded by the Act." The Court held that district court should allow Dagel to amend her complaint.

(It remains unclear what significance this holding may have for employers. In essence, it allows discharged employees to file tort claims for actions that occurred before July 1, 1987, even though their discharge took place after that date. This alone presents a legal twist that neither the legislature nor legal experts had anticipated.)

Finally, the Court addressed the question whether Manzer should be joined as a defendant in Dagel's lawsuit. Dagel had already filed a separate suit against Manzer (see "Dagel II," p. 64), and the issues in both suits arose from the same circumstances. Thus, the Court ruled, "In the interest of judicial economy, plaintiff should be allowed to join Ms. Manzer as a party defendant, individually and officially."

Medicine Horse v. Trustees, Big Horn County School District No. 27, and Keenan (1991)
251 Mont.65, 823 P.2d 230

Scott Medicine Horse worked as a school custodian, a non-contract employee, beginning in 1984. In August, 1988, his supervisor began documenting deficiencies in Medicine Horse's performance and instituted weekly meetings to monitor performance. In November, 1988, Medicine Horse received a three-day suspension for misconduct; he did not appeal the disciplinary action.

In December, the district changed work schedules for the Christmas vacation while Medicine Horse was on sick leave. When he returned, he left a note for his supervisor saying he would work his usual shift, not the new one. The supervisor and superintendent considered this action insubordinate, and requested the school board fire Medicine Horse. It did.

The school board granted Medicine Horse a hearing and upheld the termination. Medicine Horse appealed to the County Superintendent, who also upheld the action, saying Medicine Horse was an at-will employee. Medicine Horse then took his case to the State Superintendent, who affirmed the decision. When the issue reached district court, the same result ensued. Medicine Horse appealed, contending he was denied due process, since he did not receive written notice of the reasons for the termination, written notice of the termination itself, nor a hearing prior to the termination.

The Supreme Court noted "that an 'at will' employee is one whose term of employment has no specific duration. Medicine Horse has provided no evidence that his employment had any specified term."

Medicine Horse contended that at-will employment was no longer a "viable" doctrine in Montana law. The Court disagreed, citing *Prout v. Sears* (see p. 31) and the Wrongful Discharge from Employment Act: "neither that Act nor any other action by the Montana legislature or this Court has nullified the 'at will' designation or § 39-2-503." Thus, held the Court, Medicine Horse was an at-will employee.

Medicine Horse argued that he still was entitled to written notice. The Court, however, cited past cases to show it "has interpretated the 'at will' statute to mean that notice prior to termination is not required." Medicine Horse further argued that he had a property interest in his job that entitled him to due process, a pretermination hearing. The Court disagreed: " Medicine Horse's subjective belief that he had a property interest in his job does not create such a property interest."

"A property interest ... must be creation by existing rules or regulations, state laws, or understandings," said the Court. Yet, none of these existed that would give Medicine Horse a legitimate claim to a property interest. On balance of these issues, the Court upheld Medicine Horse's termination as an at-will employee who was not entitled to due process prior to termination and held no property interest in the job.

Justice Trieweiler dissented and was joined by Justice Hunt. Trieweiler argued that Medicine Horse's at-will status was modified by his "permanent" employment, his reasonable expectation of job security, and by statements made to him by a school board member. These factors would constitute a property interest in the job, entitling Medicine Horse to due process. Further, wrote Trieweiler, due process could be satisfied only through a pretermination hearing, not the post-termination hearing Medicine Horse received.

Kizer v. Semitool, Inc. (1991) 251 Mont.199, 824 P.2d 229

In this four – three decision, the Supreme Court reversed a jury verdict and remanded the case for retrial. At issue was the admission of expert testimony and the manner in which the defense objected to it.

Robert Kizer worked at Semitool for nearly four years, advancing to the position of fabrications manager. By all evidence, his performance was good. He lost his job in a reduction-in-force in February, 1987. He filed suit, claiming wrongful discharge, breach of the implied covenant of good faith and fair dealing, and negligence. Kizer prevailed at trial, winning damages of $51,000. Semitool appealed after being denied a motion for a judgement notwithstanding the verdict.

Semitool contended that the testimony of expert witness Alan Brown improperly contained conclusions of law, rather than fact. Citing *Heltborg v. Modern Machinery* (see p. 48), the Supreme Court agreed that the testimony was improper. (Brown was the expert witness in *Heltborg*, too.) Kizer countered, saying that Semitool had waived its objection to the testimony in trial and therefore could not raise the issue on appeal. The Court, however, concluded, "Our review of the record indicates that Semitool properly preserved its objection to Brown's testimony for purposes of appeal." On these grounds, the Court reversed the verdict.

The Court addressed two other issues for "guidance on retrial." Semitool had argued that instructing the jury on negligence ran counter to the conclusions in *Heltborg;* in that case, the Court ruled that a management decision to reduce its workforce could not be subject to a claim of negligence. In this case, though, the Court said, "[W]e did not hold in *Heltborg* that there can never be a claim for negligence in the termination ...." Under the circumstances here, said the Court, the jury could examine whether Semitool was negligent in terminating Kizer.

The other issue raised by Semitool followed from the Court's decision in *Cecil v. Cardinal Drilling* (see p. 52). In that case, the Court had held that the employee had not presented any evidence to rebut the employer's statement that the discharge was for "good cause, " i.e., economic necessity. The Court noted that *Cecil* was decided under the Wrongful Discharge Act; Kizer's termination took place prior to the effective date of the Act. Further, said the Court, "[i]n contrast to *Cecil,* the evidence presented at trial in this case was sufficient to raise a reasonable jury issue as to whether Semitool acted with other than purely economic motives when it terminated Kizer's employment."

Justices Hunt and McDonough joined in the dissent penned by Justice Trieweiler. They concurred with the majority on the last two issues, but dissented from the conclusion that Semitool had properly objected to the expert testimony during the trial. Trieweiler argued that the objections raised by Semitool were not specific enough to exclude the testimony. "It is simply not fair," he wrote, "to reverse a verdict for either party based upon error which was not brought to the attention of the district judge and the other party."

Scott v. Eagle Watch Investments and Bouma (1991) 251 Mont.191, 828 P.2d 1346

This case spanned over nine years. The factors leading to litigation were set in motion in 1980 when Peter Bouma became interested in reopening an athletic club in Missoula. As he looked into the possibility, he came to know Bruce Scott, who had previously managed a tennis club. Together, the two men set about putting a plan into action. Bouma invested over three quarters of million dollars; Scott contributed his "expertise." As the project materialized, the men agreed that Scott would be general manager of the club and that they would share profits from the venture. Although they drafted an employment agreement, it was never signed.

Club membership was full even before the club opened in January, 1982. Bouma and Scott agreed to retain an accounting firm to help track finances. Within a short period of time, though, Bouma became dissatisfied with Scott's performance as manager, particularly in the financial area. In June, 1982, Scott assured Bouma that all bills were paid and the club's checking account was flush. The next day, Bouma learned from the accounting firm that the checking account was overdrawn, several bills were unpaid, and Scott had withdrawn about $13,000 in two installments. Bouma fired Scott.

Scott filed suit on several grounds, primarily seeking $720,000 in shared profits he lost due to termination. District court found that (1) Scott was an at-will employee, (2) Scott had breached his oral agreement with Bouma, (3) Bouma was justified in terminating Scott, and (4) Scott owed Bouma principal and interest on the improper withdrawals. Scott appealed.

The Supreme Court considered two issues. The first was whether Scott was an at-will employee. Yes, said the Court, "neither party signed the [draft] agreement committing them to a specified employment term." Thus, under the law, Scott's employment was at-will.

The second issue was whether Bouma breached the implied covenant of good faith and fair dealing. The Court noted that "Bouma chose to terminate [Scott's] employment due to various deficiencies in Scott's performance." Reviewing the record of those deficiencies, the Court concluded, "Overall, Scott did not fulfill the basic functions of a general manager and Bouma honestly believed his interests were being mishandled. Bouma took steps to correct the problem and was justified in terminating Scott." The Court affirmed the district court judgement in all regards.

Dagel v. Manzer (1991) "Dagel II" 251 Mont.176, 823 P.2d 874

This is the second appeal by Carlene Dagel. (See *Dagel v. City of Great Falls,* p. 61.) Dagel had filed this suit directly against her former supervisor, Charlis Manzer. The grounds were wrongful discharge, violation of constitutional rights, and negligent infliction of emotional distress. District court granted summary judgement to Manzer on three bases: 1) the Wrongful Discharge from Employment Act barred the wrongful discharge claim, as it was filed nearly three years after Dagel's discharge. Under the Act, the statute of limitations is one year. 2) The Act precludes any damages for emotional distress. 3) The doctrine of *res judicata* barred Dagel's claim that Manzer violated her civil rights under 42 USC § 1983 (1872 Federal Civil Rights Act).

The Supreme Court did not decide on the merits of the first two issues. Since Dagel had conceded the issues in district court, "these issues were not properly preserved for appeal." Summary judgement stood.

On the third issue, the Court reversed. Given the Supreme Court ruling in *Dagel I,* district court had barred Dagel's § 1983 claim against Manzer individually. However, its decision was in response to a motion to dismiss for failure to state a valid claim, rather than a motion for summary judgement. The Supreme Court found that "as a result, neither [Dagel] nor Ms. Manzer was able to present all the facts and theories regarding the claim. We conclude that ... [Dagel] has sufficiently alleged a § 1983 claim against Ms. Manzer. We further conclude that it is not appropriate to apply the holding from *Dagel I* as res judicata in this case." In effect, the ruling allowed the previous ruling from *Dagel I* to stand — Dagel could join Manzer as a defendant in that suit.

Colstrip Faculty Association, MEA/NEA v. Trustees, Rosebud County Elementary School District Nol 19 and High School District No. 19 (1992) 251 Mont.309, 824 P.2d 1008

This case concerns the avenues of appeal subsequent to a teacher's termination. The Supreme Court ruled that the school district had to submit to arbitration as well as an administrative appeal. This "double appeal" came about as a result of the district's own actions.

When Elmer Baldridge was terminated from employment as a tenured teacher, he pursued an appeal through the County Superintendent of Schools and State Superintendent of Public Instruction. Concurrently, the teachers' union filed a grievance against the district on Baldridge's behalf. After the internal grievance steps were exhausted, the union requested arbitration. The district refused to submit to arbitration.

When pressed by the union, the district petitioned district court for an injunction to compel the union and Baldridge to choose one avenue of appeal — either the administrative route or arbitration. Baldridge replied by asserting that the two avenues represented separate and distinct causes of action. The union pointed out that the district could have bargained for an "election of remedies" provision in the collective bargaining agreement, but did not.

District court denied the school district's petition. The district did not appeal the decision, yet it still refused to submit to arbitration. The union then filed a complaint asking the court to compel the district to submit to arbitration. District court granted summary judgement to the union, and the school district appealed.

The Supreme Court ruled that since the school district failed to appeal the district court's denial of an injunction, it was bound by that decision and "must participate in arbitration." "Accordingly," the Court continued, "the school district is collaterally estopped from raising the issue of whether Baldridge and the union should be allowed to pursue their separate claims in separate forums."

Justice Weber filed a special concurring opinion. He agreed with the result of the decision, but disagreed that collateral estoppel applied. The district court had held only a hearing on a petition for injunctive relief. It had not entered a final decision on the merits of the case; thus, a major element giving rise to collateral estoppel was absent. Weber said the summary judgement could have been upheld "on other grounds," without specifying them.

In the Matter of the Termination of William Wong, Wong v. Citty of Billings and Billings Police Commission (1992) 252 Mont.111, 827 P.2d 90

Must an administrative agency always reschedule a hearing to allow the employee to retain effective counsel? In this case, the answer was a limited "no," due to the neglect of the employee himself.

The sequence of events began in 1987, when William Wong, an 18-year police officer in Billings, got divorced. For the next two years, Wong carried out a campaign of harassing and threatening his ex-wife, Pamela. Most of his actions took place while he was on duty and in uniform. Pamela got a restraining order; Wong ignored it. Pamela complained to the police chief, who ordered Wong to cease his harassing activities while on duty; Wong violated the order. Finally, Pamela filed a citizen's complaint with the police department, prompting an internal investigation.

As a result of the investigation, Wong was told that a police commission hearing would take place. Wong contacted counsel for his union; the attorney said he would represent Wong if scheduling permitted. A formal complaint alleging 39 charges was served on Wong, with a hearing date set 22 days later. Wong contacted the attorney immediately, but delayed sending a copy of the complaint for a week. When the attorney requested a postponement of the hearing, the Police Commission denied it, eight days before the hearing date. The attorney then referred Wong to private counsel, who offered to take the case on retainer. Wong declined to pay the retainer. However, he went back to the private attorney two days before the hearing; at that time, the attorney declined to take the case, citing lack of time to prepare.

Wong ended up representing himself in the hearing, with assistance from the Commission on how to proceed. As a result of the hearing, the Commission permanently discharged Wong from the police force. Wong appealed to district court. The court found that the city had good cause to discharge Wong. But it held that the Commission's refusal to postpone the hearing was arbitrary and capricious, denying due process to Wong. The court reversed Wong's discharge and sent the case back to the Commission for a new hearing. The city appealed.

The Supreme Court reversed. It found, in a six – one decision, that Wong had had plenty of time to obtain counsel and prepare for the hearing; it was his own delay that landed him in the hearing without counsel. "In making its decision ...," said the Court, "a court or agency must assess whether the party petitioning for a continuance has acted diligently in seeking counsel. If the party has not acted diligently ..., a tribunal does not abuse its discretion in denying the continuance."

Here, the Court concluded "that Wong's own actions, or lack thereof, prevented him from obtaining

counsel. Therefore, the Commission did not act arbitrarily or capriciously in denying the request for a continuance." As a result, Wong received adequate due process. The Court ordered reinstatement of the original decision of the Commission discharging Wong.

Justice Weber dissented. He argued that the Commission had, in fact, acted arbitrarily in denying the request for a continuance.

Weber v. State of Montana (1992) 253 Mont.148, 831 P.2d 1359

This appeal was brought by both parties after a jury verdict in favor of the plaintiff. In addition to ruling on two issues about evidence in the case, the Supreme Court interpreted how damages may be awarded under § 39-2-905(1), MCA — the Wrongful Discharge from Employment Act's section on remedies. The Court held, five – two, that juries have the discretion under the law to determine the amount of damages, up to the cap set by the Act.

Steve Weber worked for the State for 16 years before resigning in September, 1988; at the time of his departure, he was an attorney with the Tort Claims Division in the Department of Administration. About a year later, he brought suit, claiming he had been constructively discharged — harassed, treated unfairly, and demoted for his actions involving an insurance claim submitted to his division by the Publications and Graphics Division of the same department.

Weber resisted approving the claim of $111,000; he thought it was at least $105,000 too high. Weber said his bosses then ordered him to pay the claim. He did so, but he also brought the issue to the attention of the legislative auditor. The auditor found that Publications and Graphics used the insurance money improperly, purchasing office furniture rather than replacing or repairing the damaged equipment. However, the auditor did not investigate whether the claim had been inflated.

Following the controversy, said Weber, his bosses mistreated him, falsely accusing him of work errors and not talking to him. When they informed him that his position was being reclassified — in effect demoting him — he resigned. Weber brought suit, claiming the agency had forced him to quit — in effect, constructively discharging him. A jury found in Weber's favor, awarding him $33,230. Weber appealed on the issue of damages and attorney fees. The State cross-appealed on the issue of substantial evidence to support the verdict.

The Supreme Court first considered whether certain evidence should have been admitted at trial. Weber disputed the admission of his performance appraisal and testimony regarding his performance. However, said the Court, Weber introduced evidence of his "diligent work habits," so the State was permitted to rebut that testimony. Weber raised other, more technical arguments against the admission of evidence, but the Court did not accept them.

On the other hand, the State contended that the evidence at trial failed to support the jury's verdict at all. The Court reasserted its "very limited role in reviewing jury verdicts"; viewing the evidence in favor of Weber, who prevailed, the Court concluded the evidence supported the verdict.

On the issue of damages, Weber relied on § 39-2-905(1) of the Wrongful Discharge from Employment Act, which says, in part, "... the employee may be awarded lost wages and fringe benefits for a period not to exceed four years from the date of discharge ..." Weber contended this clause mandates the full award of four years' wages and benefits. The Supreme Court emphasized the word "may" and held the statute "places the discretion in the trier of fact to determined the amount of lost wages and benefits ..." Weber also argued that the jury's award ran contrary to the evidence in his favor. The Court refused to reweigh the evidence, concluding there was "substantial evidence to support the verdict."

Weber's appeal also sought to recover attorney fees and court costs from the State. Under one theory of "private attorney general," Weber argued, he should recover the costs because he pressed the issue of a fraudelent claim by Publications and Graphics when his employing agency would not. The Court found his argument misdirected: "the present action was brought to recover losses for ... wrongful termination, not as a vehicle to reimburse the State for fraudulent claims."

From another angle, Weber claimed he was entitled to recovery under a statute that grants attorney fees and court costs if the defense of the State "was frivolous or pursued in bad faith." Weber contended that the State's defense of the "inflated" insurance claim showed bad faith. The Court said Weber again missed the mark: the State wasn't defending the claim, it was defending its discharge of Weber. The Court also pointed out that Weber initially sought $500,000 in his suit, later offered to settle for $170,000, and eventually received $33,320; "these figures demonstrate that the State's defense was not frivolous." The Court upheld denial of costs and attorney fees.

Justice Hunt dissented, joined by Justice Trieweiler. The dissent focused on the issues of damages and attorney fees. In Justice Hunt's opinion, the jury instruction concerning damages was incorrect. The jury had discretion to determine whether a wrongful discharge, in fact, occurred. Once it had made that determination, however, it should have been directed to award the maximum amount. Hunt would leave with the jury to determine how much to deduct from the award based on what the employee "could have earned."

Justice Hunt disagreed with the majority's rejection of the private attorney general theory. Weber claimed he had been discharged for trying to expose fraud and waste; the jury found that a wrongful discharge had taken place. Therefore, Weber should have fallen under the private attorney general doctrine, which arises when a private citizen sues to enforce significant public interests when the State has failed to enforce those interests.

Miller v. Citizens State Bank (1992) *252 Mont.472. 422, 830 P.2d 550*

This case went to the heart of the Wrongful Discharge from Employment Act — § 39-2-904(2) (good cause) and § 39-2-904(3) (personnel policy).

Yvonne Miller worked for Citizens State Bank for 33 years. For 10 of those years, she was operations officer, until she was fired in 1989. Managers who oversaw her work through 1987 testified that she was a good employee. A new bank president who took over in 1987, though, and Miller had a hard time working with him. The new president implemented changes in the bank; Miller resisted. Her boss was demanding; Miller bucked the system. After a poor performance evaluation and three warnings, Miller still delayed work and resisted changes, so she was fired.

Miller brought a wrongful discharge suit against the bank. After a bench trial, district court decided in favor of the bank. Miller appealed. The Supreme Court first looked at good cause. Miller wanted the Court "to adopt a new standard of 'good cause' based on whether the employee satisfied the general obligations of an employee ..., whether the employer followed industry standards of progressive discipline, and whether the defendant [employer] exercised bad faith."

The Court disposed of her proposal: "In light of the statutory definition adopted by the legislature, we conclude that it is inappropriate to apply the standard advanced by Ms. Miller." The statutory definition reads, in part, "reasonable, job-related grounds based on a failure to satisfactorily perform job duties ..." District court had found — and Miller was unable to refute — that she failed to perform her job duties satisfactorily. Thus, the Supreme Court held that "the Bank terminated Ms. Miller for good cause ..."

Miller also contended the bank had violated its own personnel policy by not providing her with a formal warning of discharge. However, the record indicate the bank president had warned Miller that continued substandard performance would result in dismissal. The Supreme Court did not find any violation of the bank's personnel policy. The Court affirmed district court's judgement in full.

Foster v. Albertsons, Inc., Engle, and Blackburn (1992) *254 Mont. 117, 835 P.2d 72*

This labor relations case is significant: it opened the door for tort actions in discharge situations where the employee worked under a collective bargaining agreement. As a result, the Court overruled *Brinkman v. State of Montana* (see p. 17) to some extent.

Barbara Foster started working as a grocery clerk for Albertsons' store in Helena from January, 1984. Her position was covered by a collective bargaining agreement. Foster claimed that during her employment, the store manager (Engle) sexually harassed her repeatedly. She claimed to have consistently resisted his advances. Engle denied harassing Foster in any way.

In March, 1987, Engle and the store's loss prevention manager (Blackburn) used "test shoppers" to determine if Foster was mishandling money. (Test shoppers act as impatient customers who leave exact change for a purchase while a clerk is handling another sale. Managers then check the clerk's till to see if the test purchases were properly rung up.) Engle and Blackburn called Foster into the office; what happened there was disputed. Foster claimed she was detained for two hours and repeatedly pushed back into a chair whenever she sought to leave. The managers denied this. Foster did write and sign a statement admitting to dishonesty. She was fired. Foster never filed a grievance under the collective bargaining agreement.

Foster filed a sex discrimination complaint with the Human Rights Commission. In March, 1988, the HRC issued her a "right to sue" letter. She brought suit in district court, claiming (1) breach of the

covenenant of good faith and fair dealing, (2) false imprisonment, (3) wrongful damage to marriage, (4) assault and battery, (5) negligent and intentional infliction of emotional distress, (6) defamation, and (7) wrongful discharge.

The case went to trial before a jury. The district court directed a verdict in favor of Albertsons on the claims of defamation, breach of the implied covenenant, wrongful discharge, and intentional infliction of emotional distress. The jury deliberated on the claims of false imprisonment, assault and battery, and sex discrimination. It found for Foster on the first two claims and cleared Albertsons of the sex discrimination claim. The jury awarded Foster $5,000 general damages and $5,000 punitive damages. Foster moved to increase the punitive damages; district court denied her motion. Foster appealed.

The Supreme Court first addressed the issues of breach of the covenenant of good faith and fair dealing and wrongful discharge. Following *Brinkman* (p. 17), *Smith* (p. 18), and *Fellows* (p. 49), the district court had ruled that federal labor law preempted these claims. On appeal, Foster pointed out that *Brinkman* should be reviewed in light of a later U.S. Supreme Court decision (*Lingle v. Norge* (1988) 486 US 399, 108 S.Ct. 1877, 100 L.Ed.2d 410). That decision held that federal labor law preempts a state-law claim, such as Foster's, only if resolving the claim requires reference to the collective bargaining agreement.

Under this holding, the Montana Supreme Court recognized that *Brinkman* was overruled to this extent: although a lawsuit in state court could look at the same set of facts as a grievance under a labor contract to determine just cause, the lawsuit was not preempted as long as it did not require any analysis of the labor contract itself. How did this affect Foster's claims?

The Court noted that "[a]ny implied covenant of good faith and fair dealing in the employment context arises from the underlying contract of employment which, here, is the collective bargaining agreement." Litigation on the implied covenant would "necessarily require placing the terms of the collective bargaining agreement in issue." So federal labor law preempted Foster's claim.

Foster's wrongful discharge claim arose from her boss's alleged sexual harassment and sex discrimination. The Court has "recognized a cause of action for discharge from employment that violates public policy. Sexual harassment is against public policy." (See *Drinkwalter v. Shipton,* p. 19, but see also *Harrison v. Chance,* p. 50.) A trial on the questions of fact surrounding sexual harassment and discharge would not depend on the meaning of any part of the collective bargaining agreement. So Foster's wrongful discharge tort claim could proceed without preemption. (Foster, as a union employee, was exempt from bringing a statutory claim under the Wrongful Discharge from Employment Act.)

Finally, the Court addressed Foster's claim of intentional infliction of emotional distress. District court had held that emotional distress could be a basis for determining damages, but could not be an independent tort action. The Supreme Court cited *Doohan* (p. 55): "We have not rejected the validity of the tort of intentional infliction of emotional distress as a separate cause of action. Rather we simply have not addressed a factual situation that would give rise to liability for the tort ..." The Court held that Foster should be allowed to present evidence of her employer's "extreme and outrageous conduct" to determine if she has a prima facie case for intentional infliction of emotional distress.

The Court remanded the case for further proceedings on the tort claims of wrongful discharge and — potentially — intentional infliction of emotional distress.

Kenyon v. Stillwater County and Laws (1992) 254 Mont.142, 835 P.2d 742

The circumstances of Roberta Kenyon's employment with Stillwater County were complicated. She began working in 1969 for a law firm. One of its partners was part-time County Attorney, so Kenyon ended up doing some work for — and being paid by — the county. By 1977, the county workload had grown to the point where Kenyon was working full-time for the county. In the interim, the other partner in the law firm, Ed Laws, had assumed the part-time duties of County Attorney.

In 1988, Laws became full-time County Attorney. He dissolved the law firm and replaced Kenyon as secretary in the county office, relegating her back to the private sector working for the former partner. That job petered out, though, as the former partner's health quickly failed.

In the fall of 1988, Kenyon brought suit against the county and Laws, alleging age discrimination, wrongful discharge, and breach of the covenant of good faith and fair dealing. District court

granted summary judgement to the defendants, finding that (1) Laws was not individually liable, (2) Kenyon did not establish a case of age discrimination, and (3) her termination was for good cause. Kenyon appealed.

The Supreme Court agreed that Laws was not individually liable, although for reasons different than the district court's. Under state law (2-9-305, MCA), a county employee is immune if the county acknowledges that his conduct arose out of the course of his official duties. "As an elected official," said the Court, "it is clear that Laws is an employee of the County for liability purposes ... Furthermore, both Laws and the county commissioners agree that Laws was acting within the scope of his official duties ... when he discharged Kenyon."

Kenyon inferred age discrimination from the fact that Laws replaced her with a younger woman. The county rebutted the allegation with evidence of Kenyon's poor performance, frequent absences, and time spent on nonprofessional duties. Under the standard used for discrimination cases, it then fell to Kenyon to produce evidence showing the county's rebuttal was a pretext. She failed to do so, so the Supreme Court upheld summary judgement on the discrimination claim.

Using the evidence introduced to rebut the discrimination claim, district court had found that Kenyon's discharge was for good cause. The Supreme Court reversed on this issue, since the "good cause issue as it related to the wrongful discharge claim was not raised or argued by either party." The county had premised its defense to the wrongful discharge claim on legislative immunity (2-9-111, MCA). "By granting summary judgement on the basis of an issue not before it," held the Supreme Court, "the court effectively denied Kenyon notice and an opportunity to be heard on the issue." The Court further reversed summary judgement on the wrongful discharge claim, holding that disputed factual issues remained as to whether the county had followed its personnel policies.

The county's defense of legislative immunity evaporated in the Supreme Court decision. District court had determined that immunity did not apply, but the county did not cross-appeal that holding to the Supreme Court, so the Court refused to address it. The Court remanded the case for further proceedings on Kenyon's wrongful discharge claim.

Farris v. Hutchinson and Board of Regents (1992) *254 Mont.334, 838 P.2d 374*

In this case, the Supreme Court essentially said a contract's a contract, and we need not look any further. The four – two decision also looked at the exemption for contract employees under the Wrongful Discharge from Employment Act.

Carol Farris worked for the Montana University System as gender equity coordinator from 1989 to 1991. During that time, she signed three "professional employment contracts," each with a term of one year. Each contract provided for nonrenewal with adequate notice. On February 5, 1991, the Commissioner of Higher Education, John Hutchinson, notified Farris that the contract expiring June 30, 1991, would not be renewed. He provided no reason for the nonrenewal.

Farris filed suit against the Commissioner and the Board of Regents. The Supreme Court opinion does not detail specific counts; it appears Farris claimed breach of the covenant of good faith and fair dealing, a tort of wrongful discharge, and wrongful discharge under the Wrongful Discharge from Employment Act. District court dismissed the suit, and Farris appealed.

District court had found that Hutchinson had not breached Farris's contract, so could not have breached the implied covenant of good faith and fair dealing. The Supreme Court disagreed: "a breach of the underlying contract is not a prerequisite to a breach of the implied covenant ..." Farris argued that objective manifestations of job security existing beside the contract could support her claim that the implied covenant was breached.

Farris cited certain oral representations as evidence of objective manifestations. Prior to her hire, she said, the Commissioner told her he viewed the job as a "permanent position." She believed that the yearly contracts were "merely a formality." In addition, she had quit her previous job, sold her house in Great Falls, and moved to Helena to take the job with the University System.

The Supreme Court was sympathetic, but said Farris's arguments "cannot overcome the Parol Evidence Rule." That rule, found at 28-2-904, MCA, states, in part, "The execution of a contract in writing ... supersedes all the oral negotiations or stipulations concerning its matter ..." and preceding its execution. So, any representations by Hutchinson, made before Harris hired on, were barred from consideration by the rule. In addition, any representations made after the contracts were signed could not be considered; 28-2-1602, MCA, states that contracts can be altered only in writing or by executed oral agreement.

As a result, said the Court, "the alleged implied covenant cannot be in direct contradiction of the written term contract." Further, "[n]o obligation can be implied which would result in the obliteration of a right expressly given under a written contract." Here, the University System had the right, under contract, not to renew the contract.

On her wrongful discharge claims, Farris argued that the Wrongful Discharge Act "imposed a just cause requirement on all employment relationships in place of common law remedies." And when the Commissioner adopted policies allowing him to terminate employment without cause through nonrenewal of a contract, he violated the public policy expressed in the Act. So even if Farris's situation was not covered by the Act (and it wasn't), she argued that the Commissioner committed the tort of wrongful discharge by terminating her employment in violation of public policy.

The Court disagreed. First, it found Farris's employment expressly exempted from the Act; 39-2-912 specifically states the Act does not apply to an employee covered by a written contract for a specific term. Second, said the Court, "[n]othing in our law forbids the parties here from entering into such a contract where the contract is exempted from the Act. We have previously upheld the discretionary rights of employers to non-renew specific term contracts without a showing of good cause. In addition no other violations of public policy have been asserted which would give rise to a wrongful discharge claim." In sum, the Court affirmed dismissal of Farris's suit.

Justice Hunt dissented, joined by Justice Trieweiler. Hunt called the decision "a devastating blow to Montana workers" that "encourages employers to deal dishonestly with employees ..." In using the parol evidence rule to bar any evidence of representations made to Farris, Hunt said the majority ignored the immediately following statute, 28-2-905, MCA. That statute allows evidence to show fraud, and Hunt noted, "The exception to the parol evidence rule for extrinsic evidence of fraud is well-established and long-standing ..."

Hunt agreed with the majority to the extent that Farris "did not bring a cause of action specifically alleging fraud." However, he continued, "it should make no difference" whether an action alleges fraud or breach of the implied covenenant of fair dealing: "The rationale for the exception to the parol evidence rule applies equally to both situations. In either case, there is an allegation that false representations have been made which can only be proven by evidence extrinsic to the contract."

Hunt would have had the Court "follow the precedent" set in *Stark* (p. 24) and *Prout* (p. 31), as well as the exception to the parol evidence rule, to allow Farris to present her case. "The application of the parol evidence rule in this case ... is unduly harsh, formalistic, and contrary to the very spirit and rationale upon which the rule is grounded."

Hanley v. Safeway Stores, Inc., Lang, and Rosso (1992) 254 Mont.379, 838 P.2d 408

This case bears a remarkable resemblance to *Foster v. Albertsons* (p. 67). Patricia Hanley worked for Safeway in Butte. Employed there for 25 years, she was a grocery clerk covered by a collective bargaining agreement. In the spring and summer of 1988, Safeway security personnel conducted checker tests; an "impatient customer" would leave exact change for a purchase and leave without waiting for the ring-up. Later, the security people would check register tapes to see if the test purchases were properly rung up. Safeway claimed that Hanley failed seven of eight such tests.

What happened next came under dispute. Safeway said Hanley met with Scott Lang and Doug Rosso, two security employees. In that meeting, she allegedly signed a letter admitting she failed to record some transactions; instead, she would set the money aside and make sure her till balanced at the end of her shift. Hanley claims she was "interrogated" by Lang and Rosso. She said she denied any wrongdoing but was prevented from leaving and was forced to sit back down. According to Hanley, after being detained for over an hour, she signed a coerced confession on the promise that no further action would be taken against her. The next day she was fired.

Hanley filed a grievance through her union; Safeway denied it. The union did not pursue arbitration. About eighteen months later, Hanley filed suit against Safeway, Lang, and Rosso. She claimed false imprisonment, emotional distress, unlawful restraint, intimidation, employer misconduct, and slander. District court granted summary judgement to Safeway, holding that federal labor law preempted all Hanley's claims. Hanley appealed.

The Supreme Court applied its decision in *Foster* to this case; it held that "a decision on the merits of [Hanley's] claims may be made by the trier of fact without reference to or interpretation of the collective bargaining agreement. The State of Montana has a substantial interest in regulating the conduct alleged in this case and such interests may be protected without interfering with the federal regulation of labor law."

Safeway raised several other issues for consideration in the appeal. The Court, however, restricted its holding to the preemption issue: "Inasmuch as the District Court granted summary judgement based on federal preemption, these [other] issues ... are not properly before this Court at this time." The Court reversed summary judgement and sent the case back to district court.

Somersille v. Columbia Falls Aluminum Co., Broussard, and Duker (1992)
255 Mont.101, 841 P.2d 483

In this case, the plaintiff had signed a termination agreement with the employer, but later decided he didn't like it. He was unable to convince the courts to invalidate the agreement or to allow his lawsuit to proceed.

Revo Somersille was chief financial officer for Columbia Falls Aluminum. In September, 1989, the company offered him a termination agreement. Somersille took it under advisement with his attorney and his wife, and four weeks later, he signed it. Under terms of the agreement, Somersille received nine months' severance pay, his portion of profit-shares to be distributed a few months later, and medical insurance for himself and his wife for 18 months. In return, Somersille waived all claims against the company.

One year later, Somersille filed suit, alleging wrongful discharge, fraud, and breach of contract. He contended the termination agreement was fraudulently induced, and that the company had breached its obligations under the profit-sharing plan. The company moved for and received summary judgement in disrict court, and Somersille appealed.

The Supreme Court first examined whether the termination agreement was valid and enforceable. Somersille contended the company misled him about the profit-sharing payments. He also claimed that the company knew that his wife's serious illness caused him emotional distress and financial hardship. Given his "economic duress," Somersille claimed the company exerted "undue influence" to get him to sign the agreement, thus "defrauding" him of his just compensation. The Court held that Somersille failed to show any evidence of economic duress, undue influence, or fraud. He had all the necessary facts and the advice of counsel before signing the agreement; the agreement was valid.

The other issue on appeal focused on profit-sharing payments. On that issue, the Court held that Somersville had waived any claims to profit-shares calculated before his termination. However, the Court found, the termination agreement specifically guaranteed Somersville a payment four months after his termination. "The amount to be paid ... was unknown ... on the date of employment termination." The Court found that Somersville had raised a factual issue about whether the later payment was correct. The Court reversed summary judgement on that issue.

Krebs v. Ryan Oldsmobile (1992) *255 Mont.291, 843 P.2d 312*

This case represents the Supreme Court's first major examination of § 39-2-904(1), MCA. This section of the Wrongful Discharge from Employment Act provides that a discharge is wrongful if "in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy."

David Krebs worked for Ryan Oldsmobile in Billings for six months. Six days before his termination on January 10, 1990, Krebs provided information to the Montana Criminal Investigation Bureau about his observations of illegal drug activity among the dealership's employees. Krebs agreed to continue providing information.

The day before his termination, Krebs informed MCIB that the vehicle of a "known fugitive" had been dropped off at Ryan. After Krebs's call, Dick Ryan hit the redial button of the phone and learned Krebs had called MCIB. The next day, the managers and other employees set Krebs up. Pat Ryan announced he was going to meet the fugitive. Employees observed Krebs making a phone call, then hit redial to find out he had called MCIB. Pat Ryan fired Krebs.

In September, 1990, Krebs filed a wrongful discharge suit. Ryan responded that Krebs didn't get along with other employees, that he disrupted the operation, and that "various other legitimate business reasons" justified the discharge. District court determined Krebs failed to present any evidence disproving Ryan's defense that the discharge was for good cause. The court also found that Krebs's conduct as a "paid informant" was not protected by the Wrongful Discharge Act. Even if it were, said the court, Krebs was not discharged in retaliation for reporting a violation of public policy. District court granted summary judgement to Ryan, and Krebs appealed.

The Supreme Court first examined the issue of good cause. The Court cited evidence introduced by Ryan to support Krebs's discharge for good cause. However, said the Court, "Krebs also presented evidence tending to show he was not discharged for good cause." Given the conflicting evidence, the summary judgement was inappropriate.

The Court also disagreed with district court's characterization of Krebs as sort of an undercover police officer. "Krebs was clearly an employee," said the Court. He volunteered information, being neither sought our nor placed by law enforcement. He was not promised payment for his information; in fact, he received only $40 from the MCIB, several weeks after he was fired.

"To hold that an individual who provides information concerning violations of public policy will not be covered by the Wrongful Discharge Act if they agree to cooperate, even minimally, with law enforcement," said the Court, "would be to thwart the very purpose of the statute." Under its interpretation, the Court found that "Krebs' conduct was protected under the Wrongful Discharge Act." Further, said the Court, a "genuine issue of material fact" remained as to whether Ryan fired Krebs in retaliation for that conduct.

The Court reversed district court's grant of summary judgement to Ryan. Krebs had also moved for summary judgement in district court; it was denied. The Supreme Court upheld that denial. The case was remanded for trial.

Allison v. Jumping Horse Ranch, Inc. (1992) *255 Mont.410, 843 P.2d 753*

This case dealt with the statute of limitations (39-2-911, MCA) in the Wrongful Discharge from Employment Act. The Supreme Court interpreted when "termination" actually takes place. It also distinguished this case (and others under the Act) from *Martin v. Special Resource Management* (see p. 54).

James Allison managed the Jumping Horse Ranch for 17 years. On July 12, 1988, owner Robert Beck told Allison he would be terminated; Beck said he thought Allison was "burned out" and would soon leave to start his own business. However, Beck asked Allison to stay on until October 1 to help train a new manager. Allison agreed and worked until October 1. On November 3, Beck signed a report for the ranch's pension program that listed Allison's termination date as October 3, 1988.

On September 29, 1989, Allison filed a wrongful discharge complaint against the ranch. At separate times, the ranch moved for summary judgement and a directed verdict, contending that the statute of limitations (one year) had run out by September 29, 1989. Both motions were denied, and Allison prevailed in a jury trial. The ranch appealed.

The ranch argued that the statute of limitations began July 12, 1988, when Beck notified Allison of the termination. The Supreme Court noted that the Wrongful Discharge Act does not define "termination of employment," so the Court set out to interpret the term. It noted a Kentucky decision that defined termination of employment as "a complete severance of the relationship of employer and employee by a positive act on the part of either or both."

The ranch cited *Martin* in arguing that the statute of limitations began on notice of termination. The Court pointed out that *Martin* was a special case; all the elements of her tort claims had accrued at the time of notice (June 16, 1987), just prior to the effective date of the Wrongful Discharge Act (July 1, 1987). (Martin's termination took effect July 17, 1987.) In *Martin*, the Court held the Act did not apply at all, so the Act's statute of limitations was not the issue.

In contrast, said the Court, where the Wrongful Discharge Act does apply "damages do not occur until the employee is no longer earning compensation from the employer ..., and this can only occur upon a complete severance of the employer-employee relationship." In Allison's case, said the Court, Beck's notice to Allison did not completely sever the employer-employee relationship. Allison continued to work for two months, drawing his regular pay and benefits. In addition, Beck had signed the pension report that listed October 1, 1988, as Allison's termination date.

As a result, Allison's "cause of action would not accrue until he stopped earning his salary and benefits." Thus, the filing of Allison's suit on September 29, 1989, was within the Act's one-year statute of limitations; the Court affirmed district court's denial of the ranch's separate motions for summary judgement and directed verdict.

Hoffman v. Town Pump, Inc. (1992) *255 Mont.415, 843 P.2d 756*

This case dealt with the same section (39-2-911, MCA) of the Wrongful Discharge from Employment Act as *Allison* (above), but on a different issue — the requirement to exhaust internal procedures before going to court. The case also dealt with the award of attorney fees under § 39-2-914, MCA.

David Hoffman began working for Town Pump in 1985. In the first four years of his employment, he managed stores in East Helena and Helena. In June, 1989, he took over a store in Hardin; the transfer settled Hoffman's grievance over a hiring issue. A couple weeks later, he transferred to Colstrip to run a store there.

Housing was tight in Colstrip. Hoffman stayed in a motel longer than Town Pump had agreed to pay for. Hoffman was still unable to find housing he could afford, so he lived with his son in his car for two weeks. By Hoffman's account, Town Pump offered no help, despite his requests. By August 19, 1989, Hoffman was fed up: he turned in a letter of resignation, effective August 24.

On the effective date of his resignation, Hoffman filed suit, claiming that Town Pump's constructive discharge of him was wrongful. In the middle of a jury trial, Town Pump moved for and received a directed verdict in its favor. Town Pump's sole defense leading to the directed verdict was that Hoffman had failed to used the employer's grievance procedure before filing suit. The district judge denied Town Pump's request for attorney fees, but later amended his decision, ordering Hoffman to pay $25,000 in attorney fees to Town Pump. Hoffman appealed.

Section 39-2-911, MCA, of the Wrongful Discharge Act has three subsections: (1) a one-year statute of limitations, (2) a requirement that, before filing suit, an employee exhaust available grievance procedures offered by the employer, (3) a requirement that the employer provide written notice of its grievance procedure within seven days of the date of discharge, or else subsection (2) does not apply. Hoffman based his appeal on the assertion that Town Pump didn't comply with subsection (3), so he didn't have to comply with subsection (2).

The Supreme Court did not agree with Hoffman's argument. Since Hoffman filed suit the same day his resignation took effect, noted the Court, it would have been "impossible" for Town Pump to provide written notice of its grievance procedure within seven days of the date of discharge. Since Hoffman's own actions precluded the notice, he was not excused from using the grievance procedure. The Court stated that, if Hoffman chose to go back and exhaust the grievance procedure, he could then refile his lawsuit.

On the second issue — attorney fees — the Court's holding is unclear. Under the arbitration section (§ 39-2-914, MCA) of the Wrongful Discharge Act, "[a] party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action ... is entitled ... to reasonable attorney fees subsequent to the date of the offer." Town Pump sent a written offer of arbitration to Hoffman; he rejected it. Town Pump prevailed by directed verdict in the lawsuit. Yet the Court held, "No agreement to arbitrate existed between the parties as required by statute. The award of attorney fees was in error, and therefore, is reversed."

Frazer Education Association v. Board of Trustees, Valley County School District No. 2 (1993) *50 St.Rep. 41, 846 P.2d 267*

The question in this case was whether a dismissed teacher could pursue two avenues of remedy at the same time. The Supreme Court decided he could, and distinguished this case from *City / County of Butte-Silver Bow v. Montana State Board of Personnel Appeals* (see p. 18).

The Valley County School District dismissed teacher James Wheeler in September 1990. A couple months later, Wheeler started the process provided in Montana statute by filing an appeal with the county superintendent of schools. A hearing was scheduled, then delayed for three months. Wheeler also filed a grievance under his collective bargaining agreement. The district superintendent refused to process the grievance, since Wheeler had a statutory appeal pending.

Wheeler then withdrew his statutory appeal, and his union (Frazer Education Association) filed suit to compel arbitration of the grievance. District Court granted summary judgement for the union. The school district appealed. The issue here was whether a union may pursue a grievance to arbitration, even though the teacher may have initiated a statutory appeal. The Supreme Court recognized this as "essentially the same issue" as in *Colstrip Faculty v. Rosebud County Trustees* (see p. 64); however, the *Colstrip* decision was reached on narrow, procedural grounds.

The Court noted that the school district relied on *Butte-Silver Bow* in refusing to hear the grievance.

Its interpretation, said the Court, was incorrect: in *Butte-Silver Bow*, the collective bargaining agreement itself provided that a dismissal would be contested through a statutory appeal. Such was not the case here.

The district argued that the legal doctrine of "election of remedies" barred the union from pursuing a grievance once Wheeler filed his statutory appeal. The problem, according to the district, would be defending against two proceedings at the same time, with possibly conflicting results. The union countered that the district could have bargained to restrict available remedies in the collective bargaining agreement, but didn't.

The Court analyzed the election of remedies doctrine. In applying it to the circumstances of this case, the Court found the doctrine did not apply. The doctrine comprises three criteria: 1) the existence of two or more remedies, 2) inconsistency between the remedies, and 3) a choice of one of them. In this case, said the Court, "it is clear that the remedies sought are consistent ..." This finding contradicted the second criterion, making the doctrine of election of remedies inapplicable to this situation.

The Court noted that "a duplication of hearings ought to be avoided when possible, [but] there is nothing in the collective bargaining agreement nor the law of election of remedies which precludes concurrent proceedings in this situation." The holding affirmed district court, requiring the school district to proceed with Wheeler's grievance.

Three of the seven justices joined in a special concurring opinion. They would have reached the same holding, but only because Wheeler had withdrawn his statutory appeal. This left him "but one remaining remedy available under the terms of the collective bargaining agreement ..." Once the statutory appeal was abandoned, the election of remedies should no longer have been a question for discussion.

King v. Special Resource Management, Inc., Entech, Inc., and Montana Power Company (1993) *50 St.Rep. 117, 846 P.2d 1038*

This appeal from a jury verdict focused on procedural questions. In its decision, the Supreme Court overruled a 1976 decision and "changed the rules" for contesting some peremptory challenges in juror selection.

James King began working for Montana Power (MPC) in 1980. After about six years, he transferred into Special Resource Management (SRM), a subsidiary of Entech, which is a subsidiary of MPC. After 15 months at SRM, King lost his job through a reduction in force in July, 1987. He filed suit, claiming breach of the covenenant of good faith and fair dealing. (King had been notified of the termination before July 1, 1987, so the Wrongful Discharge Act did not cover his claim.)

Prior to trial, district court granted eight peremptory challenges to the three defendants — twice the normal number of four. A peremptory challenge allows a party to reject a potential juror without any explanation. The reason for the additional challenges in this case was the companies' "diversity of interests." Over King's objection, the trial proceeded. After all the evidence had been heard, the judge directed verdicts acquitting Entech and MPC of any liability. The jury then determined that SRM had not breached the covenant of good faith and fair dealing. King appealed.

The appeal focused on whether the extra peremptory challenges should have been allowed. King argued that the law allows additional peremptory challenges only when "hostility," not diversity, existed among the multiple defendants. The companies claimed that hostility did exist, and besides, in order for King to successfully contest the extra challenges, he would have to show that the action prejudiced him. The need to show prejudice had been set forth in an earlier Supreme Court decision, *Leary v. Kelly Pipe Co.* (1976, 169 Mont. 511, 549 P.2d 813).

The Court re-examined the rule and found it had no way to determine whether prejudice had occurred once a jury trial had started "without invading the internal process of a jury." So the Court overruled the *Leary* rule, saying if extra peremptory challenges were improperly granted, "prejudice is presumed as a matter of law." And the extra challenges can be granted only when the multiple parties on one side are hostile to one another.

In this case, the Court held that "diversity" was not the same as "hostility"; district court's grant of extra challenges based on diversity of interests among the companies was incorrect. The Court didn't buy SRM's contention that hostility did exist: "All three defendants acted in concert, with no

hostility exhibited by their efforts to prevent a verdict against SRM." The Court reversed the jury's verdict, entitling King to a new trial.

The Court upheld the directed verdicts in favor of Entech and MPC. King had argued that the reversal returned all parties to their positions before the trial. The Court, however, held that the jury was not involved in the directed verdicts, only in the verdict acquitting SRM. The error leading to a new trial had involved the selection of the jury, so only SRM had to defend itself in a new trial.

Miller v. Glacier County, Big Springs, Koepke, & Johnson (1993) 50 St.Rep. 339, 851 P.2d 401

In this case, the Supreme Court again addressed a question of "multiple remedies" for contesting a discharge. The Court's analysis was complicated by the fact that it involved both federal and state law, and the record did not contain a copy of the collective bargaining agreement needed as part of the analysis.

Robert Miller worked for Glacier County Medical Center from July, 1979, to October, 1984. The hospital fired him for misconduct. Miller filed a grievance through his union, and he also filed a lawsuit against the Glacier County, owner of the hospital. The lawsuit alleged wrongful discharge, breach of the covenant of good faith and fair dealing, and defamation, with later amendments that claimed wrongful discharge in violation of public policy and denial of due process under 42 USC § 1983 (1872 Federal Civil Rights Act). Because Miller had already initiated his grievance, the county sought to have the lawsuit dismissed.

Miller's grievance went all the way to arbitration. In June, 1985, the arbitrator decided in favor of the county, ruling that Miller had been fired for insubordination. The lawsuit dragged on through discovery for seven years. (In all the discovery activity, a copy of the union contract was never placed in the record.) In May, 1992, district court granted the county's motion to dismiss. Miller appealed.

Miller contended his claims were not based on the collective bargaining agreement and were not proper for consideration by the arbitrator. The county argued that Miller's lawsuit was preempted by federal labor law. The Supreme Court noted, "The issue before us directly involves the collective bargaining agreement .... The record before us does not include a copy of that contract." So, rather than reach a controlling decision, the Court decided to "review pertinent legal principles" to assist district court when it got the case back.

The Court noted that "collective bargaining agreements must be interpreted by application of federal law, not state law." The Court referred to *Foster v. Albertsons* (see p. 67) to reiterate that some claims may require resolution under state law. However, if the collective bargaining agreement contains a clause that "any controversies" will be subject to arbitration, such a clause enables the arbitrator to consider issues beyond those covered by the federal law, such as Miller's tort claims. If the contract lacks the "any controversy" clause, the arbitrator is confined to using federal law to interpret the contract, and other claims may proceed in court.

Miller's § 1983 claim garnered special notice; the Court cited precedent from the U.S. Supreme Court that arbitration is an inadequate substitute for litigation on a § 1983 claim. Even if an arbitrator decides on the issue, the claim may still be pursued through litigation. The Court concluded, "Clearly, Miller's § 1983 claim must be considered by the District Court. Because of the absence of a copy of the collective bargaining agreement, we are not able to comment on which of Miller's state-law claims may be justiciable in District Court." The Court sent the case back for further consideration in light of the guidance in this opinion.

Minnie and Minnie v. City of Roundup and Knudsen (1993) 50 St.Rep. 342, 849 P.2d 212

This case again involves § 1983 of the 1872 Federal Civil Rights Act. Joan Minnie worked for the City of Roundup for several years, first as city water clerk, then city clerk from 1979 until her termination in July, 1990. Joan and her husband, Ken, filed this suit against the city and 13 individuals, including Knudsen, the city attorney. The suit contained several claims: wrongful discharge under the Wrongful Discharge from Employment Act, breach of the covenant of good faith and fair dealing, negligent infliction of emotional distress, intentional infliction of emotional distress, loss of consortium, and violation of constitutional rights under 42 USC § 1983.

District court granted the city's motion for summary judgement on all claims. The court held the wrongful discharge claim barred under the statute of limitations. In addition, the Minnies' allegations in their § 1983 claim failed to create a question of fact. The Minnies appealed only with respect to the city; all other defendants were dismissed from the suit.

The Supreme Court considered only the issue of the § 1983 claim. The Court held the summary judgement on that claim improper "because the record is devoid of the required showing of proof entitling Roundup to judgement." With a motion for summary judgement, the city was obligated to support the motion with evidence. "Roundup presented nothing outside its responsive pleading and the argument of counsel to support its summary judgement motion." Thus, the Court reversed summary judgement on the § 1983 claim.

Lueck v. United Parcel Service (1993) 50 St.Rep. 401, 851 P.2d 1041

In this case, the Supreme Court acknowledged *Foster v. Albertsons* (see p. 67), but reaffirmed a portion of an earlier decision, *Brinkman v. State* (see p. 17). The Court also addressed the issue of a retaliatory discharge for filing a workers' compensation claim and the issue of an "adverse stress reaction" as an "injury" under the Workers' Compensation Act. On all issues, the Court affirmed summary judgement in favor of United Parcel Service (UPS).

Craig Lueck began working for UPS in April, 1984. As a driver, he joined the Teamsters Union. Several schedule changes took place over the course of four years, and in May, 1988, Lueck was assigned a "swing run" out of Glendive. Lueck found the new schedule difficult and complained to his bosses about losing sleep. One day in June, 1988, Lueck "flipped out" and left work. He was treated in a hospital for a couple days, then began outpatient counseling for what was described as a "physical/psychological adverse stress reaction" to working the swing shift. His doctor concluded, at least at first, that he would be unable to work that type of shift again.

Lueck filed a workers' compensation claim. It was denied, and he did not appeal. He filed a disability claim with the Teamsters, but it was denied because he had started playing weekend gigs with a band. His doctor reported on the union claim that Lueck could return to work October 11, 1988. UPS found all this out and tried to get Lueck back to work. After several futile attempts, the company fired Lueck in December, 1988. A year later, Lueck filed suit, claiming UPS had fired him in retaliation for filing the workers' compensation claim. He also alleged that UPS had intentionally inflicted emotional distress when it ignored his complaints about the swing shift. He later amended his complaint to include a claim that UPS had failed to give him preference for another job, as required by the Workers' Compensation Act. District court granted summary judgement to UPS, and Lueck appealed.

The Supreme Court upheld summary judgement on the claim of retaliatory discharge because Lueck "failed to exhaust the remedies available to him under the collective bargaining agreement ...." The Court noted that the *Foster* case overruled a part of the *Brinkman* decision, but held that "to the extent that *Brinkman* requires an employee subject to a collective bargaining agreement to exhaust his remedies under that agreement, it is not overruled." Lueck had tried once to meet with a Teamsters representative, but when the union official didn't show, Lueck made no further efforts to use the grievance procedure.

The Court noted that "[e]ven if Lueck had gone through the prescribed grievance procedure, however, his retaliatory discharge claim would fail for lack of evidence. ... UPS amply documented its efforts to persuade Lueck to return to work, which were justified by the information it had at the time. From UPS's point of view, Lueck simply abandoned his job without providing a coherent explanation and without filing a grievance after he was discharged."

Lueck's amended complaint concerned a UPS vacancy in March, 1989. He asserted that UPS was required by law to prefer him for the job, but it did not notify him of it. District court had dismissed the claim, saying Lueck was not "injured" under the law's definition, and anyway, he had not applied for the preference. The Supreme Court agreed that Lueck's "adverse stress reaction" was not a compensable injury, and it rejected Lueck's argument that he suffered from an occupational disease.

Lueck's claim of intentional infliction of emotional distress likewise got nowhere. The Court noted, "In the past we have characterized emotional distress as an element of damages rather than a distinct cause of action .... Even if considered only for the purpose of establishing damages, however, Lueck's deposition testimony demonstrates that absence of any genuine issue of material fact concerning the severity of his alleged emotional distress."

Weber v. State of Montana(1993) 50 St.Rep. 425, ___ P.2d ___

This was Weber's second appeal in his wrongful discharge suit against the state (see p. 66). This go-around focused on a couple technical issues: 1) was Weber entitled to interest on the judgement he

received? 2) Did the state have to pay half the cost of the trial transcript used in the first appeal? The answers, respectively, were "no" and "yes."

The jury in Weber's trial awarded $33,230 in damages and $3,828 in costs. Weber sought an additional $6,000 in interest. Relying on § 2-9-317, MCA, district court disallowed any interest on the award. The statute prohibits any interest on a judgement that is paid within two years of its entry. On appeal, Weber attacked the constititutionality of the statute; he contended it was a statutory grant of sovereign immunity, which requires a two-thirds vote of each legislative house on passage. Since § 2-9-317, MCA, was adopted by simple majority votes in 1977, Weber argued, it was invalid.

The Supreme Court disagreed: "Section 2-9-317, MCA, is not a sovereign immunity statute. ... [I]nterest is a separate issue from the cause of action. And it is only the cause of action which is involved with sovereign immunity." The Court upheld the denial of interest on Weber's award.

The Court also upheld the order that the State pay half the $6,000 cost of the trial transcript used in the first appeal. Because the state had cross-appealed and because both parties were partly successful in the first appeal, said the Court, splitting the cost of the transcript was appropriate.

Tonack v. Montana Bank of Billings (1993) 50 St.Rep. 518, ___ P.2d ___

This decision arose from a lawsuit in which the plaintiff had successfully recovered damages under both the Wrongful Discharge from Employment Act (WDFEA) and the federal Age Discrimination in Employment Act (ADEA). The Supreme Court took another look at the exemption in the WDFEA at 39-2-912, MCA (see appendix).

Betty Tonack began working for Montana Bank in Sidney as a teller in 1981. In 1988, she transferred to the affiliate bank in Billings and took a promotion to Financial Services Representative (FSR). An evaluation in early 1990 showed her performance as fully satisfactory, and her job was expanded to include supervision of tellers. In May, 1990, Lynette Kiedrowski became Tonack's new supervisor. Kiedrowski put Tonack on probation the following August due to a theft in the bank; however, the theft had occurred in an area outside Tonack's supervision and while she was on vacation. Kiedrowski also cut Tonack's job back to just the FSR duties.

Kiedrowski apparently was grooming another person, newly hired, for Tonack's FSR job, and she told Tonack to train the person to serve as backup. Tonack scheduled the training, but postponed it when nobody showed up to cover the trainee's regular job. The new person then quit. Kiedrowski was out of town at the time, but when she returned, she fired Tonack. The other person then withdrew her resignation and was placed in Tonack's job.

Tonack filed suit, and in a bench trial, district court decided the bank had violated both the WDFEA and the ADEA. Tonack was awarded the maximum four years' wages and benefits under the WDFEA and damages under the ADEA running to her expected date of retirement.

On appeal, the bank challenged certain findings of fact concerning the ADEA claim. The Supreme Court reviewed the record extensively and concluded that substantial evidence supported the district court's findings.

The bank also argued that Tonack failed to show that the bank's stated reasons for firing her were a pretext for age discrimination. In a discrimination case, the employee must build a credible case that discrimination occurred. The employer then presents a nondiscriminatory reason for its action. The burden then shifts back to the employee to prove that the employer's reason was a pretext for actual discrimination. In this case, the Court found that "Tonack provided evidence to disprove the legitimate explanation offered by the bank." The evidence included her satisfactory evaluations, testimony that the bank system president wanted her out because of her age, the false basis of her probation, and clear indication that the bank was grooming a much younger person for Tonack's job.

Third, the bank contended that § 39-2-912, MCA, prohibited Tonack from recovering damages under both the WDFEA and the ADEA. The statute is a section of the WDFEA and exempts a discharge "that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute." Tonack cited to federal district court pretrial orders allowing concurrent actions under both the WDFEA and the ADEA when separate facts support each claim (*Vance v. ANR Freight,* D. Mont., 9 Mt. Fed. Rpts. 36; *Higgins v. Food Services of America,* D. Mont., 9 Mt. Fed. Rpts. 529). The Supreme Court demurred, "We decline to completely follow those decisions, exercising our prerogative as the ultimate authority on the interpretation of Montana statutes."

The statute, said the Court, exempts the WDFEA from "'a discharge' subject to other statutes. It does not provide that the Act applies to all factual claims not covered by other statutes. Tonack's claims ... relate to *one* discharge from employment at the bank. We conclude that Tonack may not recover under both the ADEA and the Wrongful Discharge Act."

With this ruling, the Court clarified its holding in *Deeds v. Decker Coal* (see p. 53). Because a person may not know immediately what remedies apply, "claims may be filed under the Wrongful Discharge Act and other state or federal statutes ..., but if an affirmative determination of the claim is obtained under such other statutes, the Wrongful Discharge Act may no longer be applied." The Court remanded this case for recalculation of damages, excluding those under the WDFEA.

Beasley v. Semitool, Inc., Semitherm, Inc., and Thompson (1993) 50 St.Rep. 522, ___ P.2d ___
Similar to *Tonack v. Montana Bank* above (and decided on the same day), this case involves concurrent claims for damages, but the results are different. Here, the Supreme Court ruled that a plaintiff may pursue contract claims arising in the employment context separate from a discharge.

L. Michael Beasley went to work for Semitool in June, 1986. He left a job in Kentucky to accept Semitool's offer; Beasley claimed Semitool orally promised him stock options, bonuses, and opportunities for advancement. Beasley apparently did an excellent job for Semitool, and in November, 1987, he transferred to Semitherm, a sister corporation. Again, according to Beasley, he received oral promises of raises, bonuses, and stock options. In January, 1989, Beasley quit over the company's failure to keep its promises.

Beasley filed suit, claiming breach of express and implied contract, breach of the covenant of good faith and fair dealing, and wrongful discharge. Semitool asked for — and received — summary judgement on grounds that the Wrongful Discharge from Employment Act (WDFEA) was the only remedy available to Beasley, and that he had no grounds for relief under the Act. Beasley appealed; in the process, he dropped his wrongful discharge claim, as he had landed a high-paying job in Texas.

The summary judgement had been grounded on § 39-2-913 of the WDFEA, which preempts common law remedies: "Except as provided in this part, no claim for discharge may arise from tort or express or implied contract." Beasley argued that his contract claims stemmed from Semitool's failure to pay him as promised; the damages occurred, he said, prior to his resignation.

The Supreme Court agreed: "We conclude that § 39-2-913, MCA, bars claims *for discharge* arising from tort or implied or express contract, but does not bar all tort or contract claims merely because they arise in the employment context." The Court allowed that Beasley's complaint was somewhat confusing, but still found that he had made separate claims arising from separate circumstances: "Beasley's reliance in his complaint on the same set of facts for his three causes of action does not require dismissal of the alleged independent contract-based claims." The Court remanded the case for further consideration of Beasley's contract claims.

Mannix v. Butte Water Company and Washington (1993) 50 St.Rep. 691, ___ P.2d ___
After the first appeal in this case (see p. 60), Gary Mannix's claim went to trial in August, 1991. During the trial, the district judge directed verdicts clearing the water company of wrongful discharge and breach of the covenant of good faith and fair dealing. The judge also ruled out any punitive damages. The jury came back with a special verdict finding that the water company board of directors had a sound basis to conclude that retaining Mannix as president was no longer in the company's best interest. Mannix appealed on several issues.

Mannix contested district court's refusal to allow hearsay evidence — conversations he had with parties familiar with the situation before his termination. The Supreme Court noted that the evidence Mannix sought to present was admitted through other testimony, so district court had been right to stand by the general rule to disallow hearsay evidence.

The trial had taken place in Flathead County, after the water company requested a change in venue from Silver Bow County. Mannix contested the move on appeal. The Court reviewed the news coverage the case had received in the Butte area and concluded that district court had not abused its discretion in granting the change in venue.

The third issue involved testimony by a "lay witness" — a member of the water company board until just after it changed hands. In examination, he was asked his opinion about the interest of the

company in retaining Mannix as president. The defense objected to the question, and district court sustained the objection. The Supreme Court noted that his opinion would have been allowable if it were to help the jury determine a fact at issue. However, since the person "was not a member of the board that made the decision [to terminate Mannix], his opinion was irrelevant and inadmissable."

District court had also disallowed testimony by an expert witness, a labor relations consultant. In deposition, the consultant had admitted a lack of experience in corporate law or the termination of corporate officers. Using this information, the defense had moved to exclude the consultant's testimony on the grounds he was not qualified. District court granted the motion, and the Supreme Court affirmed it.

Mannix also contested district court's dismissal of his claim the company had breach the covenant of good faith and fair dealing. The Supreme Court was willing to assume that the covenant supplemented the law on removal of corporate officers. However, the Court also referred to *Dare v. Montana Petroleum* (see p. 9); in that case, the Court had held that existence of the covenant in a given situation hinges on "objective manifestations" of job security. Mannix argued that 12 years of service, several raises, and praise from peers and superiors established objective manifestations. He also admitted that he realized his job as president was subject to the discretion of the board. The Court held that Mannix "presented no evidence of objective manifestations," and the dismissal of the claim was proper.

Finally, Mannix argued that district court had erred in excluding a jury instruction he had proposed. The particular instruction would have established a connection between the right of the corporate board to remove and officer and the need to relate the termination to a legitimate business interest. The Supreme Court, though, held, "When read as a whole, the instructions sufficiently instructed the jury as to the scope of the board's judgment."

Justice Trieweiler dissented in two areas. He would have allowed the "lay testimony" by the former member of the water company board. Secondly, he would have required the jury instructions to state an affirmative duty owed to Mannix by the water company board.

Arnold v. Boise Cascade Corporation (1993) 50 St.Rep. 784, ___ P.2d ___

This appeal followed a jury verdict in favor of the defendant, Willard Arnold. At issue in the litigation was the factual question of the date of Arnold's termination by Boise Cascade.

Boise Cascade's personnel policy provided for "temporary curtailment leave" in the event of reduced demand for labor. The policy said the company would reinstate an employee on temporary leave when work increased; if the leave extended to six months, employment would terminate with severance pay and written notice of the termination (or two weeks' pay, in lieu of the notice).

Arnold began working for Boise Cascade at its mill in Billings in July, 1982. In February, 1988, Boise Cascade placed Arnold on temporary leave, with the likelihood he would be recalled within two months. In April, 1988, Arnold took a lower paying job with another company. He also went to Boise Cascade and requested his vacation and retirement payout. Boise Cascade later contended that Arnold's action meant he was voluntarily terminating employment. Thus, when six months of temporary leave had gone by, the company never effected the involuntary termination described in its policy.

Arnold, however, thought otherwise; he was still waiting to be recalled to work. In March, 1990, he learned that Boise Cascade was going to fill his job. He asked about it and was told he had to apply for it. The company hired another person for the job. In January, 1991, Arnold filed suit, claiming that Boise Cascade had wrongfully discharged him when it didn't recall or rehire him in March, 1990. Arnold prevailed in a jury trial and was awarded $41,920 in damages.

Boise Cascade had argued that Arnold had voluntarily quit. And even if he hadn't, his employment had ended in August, 1988, when his temporary leave had reached six months. Under the one-year statute of limitations in the Wrongful Discharge from Employment Act (WDFEA), then, he had only until August, 1989, to file suit. The company claimed it was an error to interpret the statute of limitations as running from March, 1990, when Arnold failed to get his old job back; the company claimed it had no obligation to hire him at that time.

On appeal, the Supreme Court found that the time and circumstances of Arnold's termination were "questions of fact that were properly presented to the jury." Noting that "it is not the function of this Court to agree or disagree with the jury's verdict," the Court held that substantial evidence supported the finding that the statute of limitations did not bar Arnold's claim.

Boise Cascade also disputed Arnold's testimony at trial regarding the amount of damages. The company said he was not a "labor economist" and was not qualified to calculate the value of fringe benefits. (The WDFEA provides for "lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge.") The Court reviewed Arnold's testimony and noted that he had documented his wages with W-2 forms; he also admitted that the stated value of his benefits were approximations. "Considering the testimony as a whole," said the Court, "we do not find it unreasonable that the [district] court allowed Arnold to testify about his wages and benefits ... and the amounts he earned after Boise refused to rehire him."

Boise Cascade also disputed evidence of damages presented by Arnold's attorney during summation at trial. The Court's review, though, found credible support for the damages presented. Anyway, said the Court, the jury's award was different than Arnold's or his attorney's damage estimates; "In light of the jury's obvious ability to consider the evidence as a whole and make its own determination of damages," said the Court, "we conclude there was no abuse of discretion when the [district] court allowed the challenged summation."

Finally, Boise Cascade challenged the district court's intruction to the jury defining discharge. The company had wanted the instruction to include the full definition of discharge from the WDFEA; the actual instruction used said, "Discharge includes termination of employment including resignation, failure to recall or rehire." Boise Cascade said this instruction precluded the jury from finding that Arnold was discharged by a different means and at a different time than the two circumstances advanced in court. On the contrary, said the Court, the instruction got to the heart of the dispute: did Arnold resign or did Boise Cascade terminate his employment? The instruction was proper to the case.

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the wrongful discharge from employment act

39-2-901. Short title. This part may be cited as the "Wrongful Discharge from Employment Act".

39-2-902. Purpose. This part sets forth certain rights and remedies with respect to wrongful discharge. Except as limited in this part, employment having no specified term may be terminated at the will of either the employer or the employee on notice to the other for any reason considered sufficient by the terminating party. Except as provided in 39-2-912, this part provides the exclusive remedy for a wrongful discharge from employment.

39-2-903. Definitions. In this part, the following definitions apply:

(1) "Constructive discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.

(2) "Discharge" includes a constructive discharge as defined in subsection (1) and any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.

(3) "Employee" means a person who works for another for hire. The term does not include a person who is an independent contractor.

(4) "Fringe benefits" means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of the termination.

(5) "Good cause" means reasonable, job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason.

(6) "Lost wages" means the gross amount of wages that would have been reported to the internal revenue service as gross income on Form W-2 and includes additional compensation deferred at the option of the employee.

(7) "Public policy" means a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule.

39-2-904. Elements of wrongful discharge. A discharge is wrongful only if:

(1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;

(2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or

(3) the employer violated the express provisions of its own written personnel policy.

39-2-905. Remedies. (1) If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest thereon. Interim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages.

(2) The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of 39-9-904(1).

(3) There is no right under any legal theory to damages for wrongful discharge under this part for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages except as provided for in subsections (1) and (2). [see 27-1-221, MCA, regarding "actual fraud" and "actual malice."]

39-2-906 through 39-2-910 reserved.

39-2-911. Limitation of actions. An action under this part must be filed within 1 year after the date of discharge.

(2) If an employer maintains written internal procedures, other than those specified in 39-2-912, under which an employee may appeal a discharge within the organizational structure of the employer, the employee shall first exhaust those procedures prior to filing an action under this part. The employee's failure to initiate or exhaust available internal procedures is a defense to an action brought under this part. If the employer's internal procedures are not completed within 90 days from the date the employee initiates the internal procedures, the employee may file an action under this part and for purposes of this subsection the employer's internal procedures are considered exhausted. The limitation period in subsection (1) is tolled until the procedures are exhausted. In no case may the provisions of the employer's internal procedures extend the limitation period in subsection (1) more than 120 days.

(3) If the employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employer shall within 7 days of the date of the discharge notify the discharged employee of the existence of such procedures and shall supply the discharge employee with a copy of them. If the employer fails to comply with this subsection, the discharged employee need not comply with subsection (2).

39-2-912. Exemptions. This part does not apply to a discharge:

(1) that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. Such statutes include those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, age, handicap, creed, religion, political belief, color, marital status, or any other similar grounds.

(2) of any employee covered by a written collective bargaining agreement or written contract of employment for a specific term.

39-2-913. Preemption of common-law remedies. Except as provided in this part, no claim for discharge may arise from tort or express or implied contract.

39-2-914. Arbitration. (1) Under a written agreement of the parties, a dispute that otherwise could be adjudicated under this part may be resolved by final and binding arbitration as provided in this section.

(2) An offer to arbitrate must be in writing and contain the following provisions:

(a) a neutral arbitrator must be selected by mutual agreement or, in the absence of agreement, as provided in 27-5-211.

(b) The arbitration must be governed by the Uniform Arbitration Act, Title 37, chapter 5. If there is a conflict between the Uniform Arbitration Act and this part, this part shall apply.

(c) The arbitrator is bound by this part.

(3) If a complaint is filed under this part, the offer to arbitrate must be made within 60 days after service of the complaint and must be accepted in writing within 30 days after the date the offer is made.

(4) A party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action under this part is entitled as an element of costs to reasonable attorney fees subsequent to the date of the offer.

(5) A discharged employee who makes a valid offer to arbitrate that is accepted by the employer and who prevails in such arbitration is entitled to have the arbitrator's fee and all costs of arbitration paid by the employer.

(6) If a valid offer to arbitrate is made and accepted, arbitration is the exclusive remedy for the wrongful discharge dispute and there is no right to bring or continue a lawsuit under [sections 1 through 8]. The arbitrator's award is final and binding, subject to review of the arbitrator's decision under the provisions of the Uniform Arbitration Act.

Changes in Legislative Immunity (1991 Legislature)

(Additions are underlined; deletions are interlined.)

2-9-111, MCA: **Immunity from suit for legislative acts and omissions.** (1) As used in this section: (a) the term "governmental entity" includes means only the state, counties, municipalities, and school districts, and any other local government entity or local political subdivision vested with legislative power by statute; (b) the term "legislative body" includes means only the legislature vested with legislative power by Article V of the Constitution of the State of Montana and any local governmental entity given legislative powers by statute, including school boards that branch or portion of any other local governmental entity or local political subdivision empowered by law to consider and enact statutes, charters, ordinances, orders, rules, policies, resolutions, or resolves;

(c) (i) the term "legislative act" means:

(A) actions by a legislative body that result in creation of law or declaration of public policy;

(B) other actions of the legislature authorized by Article V of the Constitution of the State of Montana; or

(C) actions by a school board that result in adoption of school board policies pursuant to 20-3-323(1);

(II) the term legislative act does not include administrative actions undertaken in the execution of a law or public policy.

(2) a governmental entity is immune from suit for an a legislative act or omission of by its legislative body, or a any member, officer, or agent thereof or staff of the legislative body, engaged in legislative acts.

(3) A Any member, officer, or agent staff of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with the introduction or consideration of legislation or action by legislative acts of the legislative body.

(4) The acquisition of insurance coverage, including self-insurance or group self-insurance, by a governmental entity does not waive the immunity provided by this section.

(4) (5) The imunity provided for in this section does not extend to any tort committed by the use of a motor vehicle, aircraft, or other means of transportation.